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Supreme Court, U.S.
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No. 04-985

In The
Supreme Court of the United States

RAYMOND BURNETT AND EVIE MOORE,

Petitioners,

v.

SONNIE E. POTTS, VIRGINIA S. POTTS, MARY MCGOWAN, LUCY DEPRIEST, THOMAS H. WARE, ADM'R., AND PEGGY D. MATHES, GUARDIAN *AD LITEM* FOR MINORS,

Respondents.

On Petition For A Writ Of Certiorari To The Tennessee Court Of Appeals For The Middle District Of Tennessee

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

In the interest of clarity, and for the benefit of the Court, Respondent has rephrased the questions presented for review:

Question No. 1: Did the Tennessee trial court and Court of Appeals err in their findings of fact and interpretations of Tennessee law, thereby violating Petitioners' due process rights?

Question No. 2: Were Petitioners denied due process because they were denied additional and discretionary appellate review, where the issue sought to be reviewed was raised for the first time in their Petition for Rehearing to the Tennessee Court of Appeals?[1]

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[1] Petitioners' Questions Presented are:

Question No. 1: Under the basic language of the Due Process Clause of the Fourteenth Amendment forbidding a state's judiciary from taking property without due process of that state's law, is it a violation thereof for state courts to deny claims of Petitioners – who were both heirs at law and beneficiaries under Decedent's first will – without trial on the merits before a jury as demanded, by the sequential steps of

(a) entering a consent judgment approving a settlement (which required dismissal of all will contest claims) between two other groups of disputing relatives, each of which charged the other, and both of which were charged by Petitioners, with having Decedent under their influence and control when more recent wills favorable to the different groups were executed, where (*i*) there was well-established Tennessee law recognizing the right of any litigant to communicate to the judge his decision to withdraw from a settlement agreement and thereby deprive the judge of any power to enter a consent judgment, (*ii*) Petitioners had felt pressured to consent to the settlement but communicated to

(Continued on following page)

QUESTIONS PRESENTED FOR REVIEW – Continued

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the judge knowledge of their withdrawal of their consent before the judge exercised the power to enter the consent judgment, (*iii*) at the settlement-approval hearing, no notice was taken of the existence of state law entitling a litigant to withdraw from a settlement agreement and the judge refused to give Petitioners time to find other counsel, but entered final judgment making the settlement agreement the judgment of the Court without intervention of the demanded jury;

(b) the state's intermediate appellate court affirmed the judgment by inaccurately pretending that the judge had approved the settlement at an earlier stage at which, from the trial judge's own statements, the requisites for vesting of settlement approval authority plainly were not met;

(c) that court refused to take any remedial action or enunciate any rationale attempting to justify its decision when it was brought to its attention by proper pleading that such was a forfeiture of property without due process of law in violation of the Fourteenth Amendment to the U. S. Constitution, and finally

(d) the state's Supreme Court refused to review such alleged violation of federal constitutional prohibitions.

Question No. 2: When it is affirmatively demonstrated to an intermediate appellate court that its decision constitutes a judicial forfeiture of property in violation of the Due Process Clause of the Fourteenth Amendment, and the Court has not answered such insistence in its principal opinion, does the state judicial obligation to support the Constitution of the United States impose upon such appellate court a positive duty to correct its error?

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PROCEDURAL HISTORY

The Circuit Court for Davidson County, Tennessee, Probate Division, entered a Final Order Dismissing Will Contest on November 14, 2002. *In re Estate of Jones*, No. 98P-1344 (Tenn. Cir. Ct., Prob. Div., Nov. 14, 2002).[1] The Tennessee Court of Appeals' opinion, affirming the Circuit Court's Order, entered on February 25, 2004. *In re Estate of Jones*, No. M2002-03073-COA-R3-CV, 2004 Tenn. App. LEXIS 126 (Tenn. Ct. App. Feb. 25, 2004).[2] The Tennessee Court of Appeals denied Petitioners' Petition for Rehearing on March 29, 2004. *In re Estate of Jones*, No. M2002-03073-COA-R3-CV, 2004 Tenn. App. LEXIS 198 (Tenn. Ct. App. March 29, 2004).[3] The Tennessee Supreme Court denied Petitioners' Application for Permission to Appeal on December 5, 2004. *In re Estate of Jones*, No. M2002-03073-SC-R11-CV (Tenn. Dec. 5, 2005).[4]

SUMMARY OF ARGUMENT

The pending Petition for Writ of Certiorari to the Tennessee Court of Appeals should be denied because it fails to raise a federal question. Though veiled in terms of "due process," the independent decisions Petitioners complain of were all based upon the Tennessee courts' findings of fact and interpretations and applications of Tennessee law. The Tennessee trial court found that all parties had consented to a settlement agreement and the

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[1] (Petition App. D, pp. App-21-App-57).

[2] (Petition App. A, pp. App-2-App-10).

[3] (Petition App. B, pp. App-12-App-13).

[4] (Petition App. C, pp. App-16-App-17).

agreement had been sanctioned by the court *before* Petitioners attempted to withdraw their consent, and thus, under Tennessee law, the court had authority to enter final judgment.[5] The Tennessee Court of Appeals reviewed these findings of fact and applications of law *de novo* and reached the same result.[6] The Court of Appeals denied rehearing, and the Tennessee Supreme Court denied discretionary review, yet Petitioners still seek a different result. They now come before this Court, requesting that this Court reevaluate the facts of the case and apply what Petitioners assert is the proper interpretation of Tennessee law.

Essentially, Petitioners request this Court to find that the state courts were wrong.[7] Petitioners disagree, not with the fairness of Tennessee law or its results as applied, but rather, with the state courts' factual findings and interpretations of Tennessee law. They have attempted to bootstrap a constitutional argument to state law issues in order to get federal review. This Court's caseload would increase one-hundred-fold if every party who lost at the trial level were allowed to argue that their constitutional rights had been violated because the court disagreed with them. Petitioners' challenges simply do not raise any federal issues and are not properly before this Court.

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[5] *See In re Estate of Jones*, No. 98P-1344 (Tenn. Cir. Ct., Prob. Div., Nov. 14, 2002) (Petition App. D, p. App-23).

[6] *See In re Estate of Jones*, No. M2002-03073-COA-R3-CV, 2004 Tenn. App. LEXIS 126 (Tenn. Ct. App. Feb. 25, 2004) (Petition App. A, pp. App-2-App-10).

[7] They request "a demonstration that the intermediate appellate opinion either misstated the facts or misstated state law." Petition, p. 15.

Further, any implicit federal issues that can be found within the Petition were not addressed by or properly presented to the state courts and have, thereby, been waived. Even if this Court were to find an implicit argument in the Petition that Tennessee law violates due process, Petitioners did not properly or timely raise such a challenge during their state appeals and have, thereby, waived any such argument.[8] In fact, Petitioners never even mentioned due process until their Petition for Rehearing to the Tennessee Court of Appeals, and at that point, it was based entirely upon Petitioners' assertion that the courts misrepresented the facts and misapplied state law.[9] Any due process argument is now waived because it was not properly presented below.[10]

Even if this Court were to find an implicit allegation that Tennessee law violated Petitioners' due process rights, and find that such an allegation is properly and timely before this Court, it would be an unfounded allegation as there simply is no due process violation. Due process is a flexible concept requiring only that a party be given notice and a meaningful opportunity to be heard, as

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[8] *See Adams v. Robertson*, 520 U.S. 83, 86, 117 S. Ct. 1028, 1029, 137 L. Ed. 2d 203 (1997) (The Supreme Court of the United States "will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision [it has] been asked to review.").

[9] *See* Appellants' Petition for Rehearing (Petition App. E, pp. App-60-App-61). Petitioners concede that the first time they raised the due process argument was in their Petition for Rehearing. *See* Petition, pp. 3-4.

[10] *See Adams*, 520 U.S. at 86, 117 S. Ct. at 1029.

is reasonable under the circumstances.[11] In this case, Petitioners were given notice and a meaningful opportunity to be heard. The trial court even set aside a default judgment against them to allow them to participate in the will contest, despite the fact that they had not timely entered their appearance.[12] They were participants in all stages of the litigation for over two years, including settlement negotiations. Petitioners were represented and advised by competent counsel, and they indisputably consented to the settlement agreement.[13] Petitioners' complaint is that they were not allowed to back out of the agreement after it was sanctioned by the court. This simply is not a denial of due process.

Finally, none of the factors set forth by this Court in its local Rule 10 as compelling reasons for the Court to grant review is present in this case. The opinion being challenged was not rendered by a federal court, does not involve a matter of federal law, and does not create a conflict of law.

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[11] *See Matthews v. Eldridge*, 424 U.S. 319, 333-34, 96 S. Ct. 893, 902, 47 L. Ed. 2d 18 (1976).

[12] *See In re Estate of Jones*, No. M2002-03073-COA-R3-CV, 2004 Tenn. App. LEXIS 126, at *2-3 (Tenn. Ct. App. Feb. 25, 2004) (Petition App. A, p. App-4).

[13] *See In re Estate of Jones*, No. 98P-1344 (Tenn. Cir. Ct., Prob. Div., Nov. 14, 2002) (Petition App. D, pp. App-22-App-23).

STATEMENT OF THE CASE[14]

This appeal, and the appeals preceding it, center on a Tennessee trial court's sanction of a settlement agreement and entry of final judgment in a will contest. The litigation began in 1998, when two wills of Erin Murray Jones were

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[14] Respondents do not agree with Petitioners' presentation of the facts in many instances. Pursuant to SUP. CT. R. 15(2), Respondents take particular issue with Petitioners' assertions that:

(a) The settlement was not approved or sanctioned by the court until the November 4 hearing, after Petitioners had withdrawn their consent. Petition, pp. 7-10.

(b) The probate judge was acting only as settlement judge at the time he sanctioned the parties' agreement. Petition, pp. 5, 7, 9.

(c) The terms of the settlement agreement were not finalized at the settlement conference, but rather, were worked out over the next ten days, and were not presented to the judge before he stated his approval. Petition, pp. 7-8.

(d) No party contested the validity of the 1974 will. Petition, p. 8 & n.9.

(e) None of the attorneys knew that there was a body of Tennessee law addressing when a party could and could not withdraw his consent to a settlement agreement before it became binding, and that this lack of knowledge was due to their failure to research it. Petition, pp. 3, 11.

(f) The Tennessee Court of Appeals "*knowingly* failed to follow the law" (Petition, pp. 3-4); made "inaccurate statements of the record" (Petition, p. 9); or omitted mention of facts. Petition, p. 9.

Respondents' Statement of the Case, *infra*, is consistent with and supported by the Tennessee Court of Appeals' statement of the facts. Respondents adopt and incorporate the facts as stated in Respondents' Brief to the Tennessee Court of Appeals (Attached App. 2, pp. A32-A39) and the opinion of the Tennessee Court of Appeals. *In re Estate of Jones*, No. M2002-03073-COA-R3-CV, 2004 Tenn. App. LEXIS 126, at *1-5 (Tenn. Ct. App. Feb. 25, 2004) (Petition App. A, pp. App-3-App-6).

offered for probate.[15] Shortly thereafter, another will was offered for probate. In 1999, as the parties proceeded with discovery, one of the parties filed a motion for entry of default judgment against certain heirs at law and legatees who had been served with notice but had failed to take any action to join the proceedings.[16] The probate court granted the motion and entered default judgment in November 1999.[17] The default judgment included Petitioners.[18]

In December of 1999, more than a year after the litigation began, Petitioners moved to set aside the default judgment against them so they could join in the litigation.[19] The court granted their motion and set aside the default judgment in July 2000.[20] Thereafter, two more wills were offered for probate, bringing the total to five competing wills, with eleven interested parties disputing their validity.[21]

It is noted that Petitioners had a proportionately small interest in the litigation, as they had absolutely no interest in the most recent four wills.[22] The only way the

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[15] *See In re Estate of Jones*, No. M2002-03073-COA-R3-CV, 2004 Tenn. App. LEXIS 126, at *2 (Tenn. Ct. App. Feb. 25, 2004) (Petition App. A, p. App-4).

[16] *See id.* at *2-3 (Petition App. A, p. App-4).

[17] *See id.*

[18] *See id.*

[19] *See id.* at *3 (Petition App. A, p. App-4).

[20] *See id.*

[21] *See id.* at *2 (Petition App. A, pp. App-3-App-4).

[22] *See* Tennessee Court of Appeals Brief of Appellants Raymond Burnett and Evie Moore (Attached App. 1, pp. A6-A8); *see also* Tennessee Court of Appeals Brief of Appellees Sonnie E. Potts et al. (Attached App. 2, pp. A36-A37).

Petitioners stood to gain anything from the probate proceedings was in the unlikely event that four of the most recent five wills were invalidated or if all five wills, executed over a twenty-four year period, were deemed invalid.[23] Even if this were to occur, Petitioners' shares of the estate would have been marginal compared to those of the other parties to the proceeding.[24]

In 2002, within weeks of trial, all of the parties except for Petitioners attempted and were successful settling their dispute.[25] The parties requested that the court convert a pre-trial conference into a settlement conference so they could negotiate with Petitioners.[26] After several rounds of discussions, a settlement offer was made to Petitioners' attorney.[27] Petitioners' attorney requested an opportunity to confer with his clients by telephone that night or the next morning regarding the settlement.[28] The trial judge offered to participate in this telephone call, but Petitioners' attorney declined.[29] At that time, the other parties to the dispute requested that the court require the in-person attendance of Petitioners, who resided in Florida, for

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[23] *See* Tennessee Court of Appeals Brief of Appellants Raymond Burnett and Evie Moore (Attached App. 1, pp. A6-A8).

[24] For example, under the 1974 will, Petitioners each stood to take 2.08% of the estate. *Id.*

[25] *See In re Estate of Jones*, No. M2002-03073-COA-R3-CV, 2004 Tenn. App. LEXIS 126, at *3 (Tenn. Ct. App. Feb. 25, 2004) (Petition App. A, p. App-4).

[26] *See* Tennessee Court of Appeals Brief of Appellees Sonnie E. Potts et al. (Attached App. 2, p. A37).

[27] *See id.* (Attached App. 2, p. A38).

[28] *See id.*

[29] *See id.*

further settlement negotiations.[30] For Petitioners' convenience, the court declined to require them to personally appear.[31]

After the settlement conference recessed, Petitioners' attorney relayed the settlement offer to them by telephone, and Petitioners agreed to the settlement.[32] Pursuant to their authorization, Petitioners' attorney relayed their consent to the court.[33] Upon receiving the consent of all parties, the trial judge sanctioned the settlement and vacated the trial.[34] Ten days later, Petitioners attempted to withdraw their consent to the settlement.[35] At the hearing held to implement the settlement, Petitioners acknowledged that they had agreed to the settlement and had authorized their attorney to communicate their consent, but they asserted that they had later changed their minds and wanted to back out of the agreement.[36] The trial court found that the settlement had been agreed to by all parties and sanctioned by the court before Petitioners' attempt to withdraw and, thus, Petitioners' attempt to withdraw was untimely.[37] The trial court

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[30] *See id.*

[31] *See id.*

[32] *See In re Estate of Jones*, No. 98P-1344 (Tenn. Cir. Ct., Prob. Div., Nov. 14, 2002) (Petition App. D, pp. App-22-App-23).

[33] *See id.*

[34] *See id.*

[35] *See In re Estate of Jones*, No. M2002-03073-COA-R3-CV, 2004 Tenn. App. LEXIS 126, at *3-4 (Tenn. Ct. App. Feb. 25, 2004) (Petition App. A, pp. App-4-App-5).

[36] *See In re Estate of Jones*, No. 98P-1344 (Tenn. Cir. Ct., Prob. Div., Nov. 14, 2002) (Petition App. D, p. App-23).

[37] *See id.*

proceeded in entering final judgment and dismissing the will contest.[38]

Petitioners appealed the trial court's judgment to the Tennessee Court of Appeals, arguing that the trial court erred in its application of Tennessee law.[39] More specifically, Petitioners argued that, because the settlement agreement had not been sanctioned *in open court* before their attempted withdrawal, their withdrawal was effective under Tennessee law, and the trial court lacked authority to enter judgment.[40] The Tennessee Court of Appeals disagreed with Petitioners' assessment of the facts and the law and agreed with the trial court that the settlement had been sanctioned by the court prior to the attempted withdrawal and was therefore enforceable.[41] Accordingly, the Tennessee Court of Appeals affirmed the trial court's judgment.[42]

Petitioners then filed a Petition for Rehearing, asserting various due process arguments *for the first time*.[43] The Court of Appeals denied the Petition for Rehearing without

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[38] *See id.* (Petition App. D, pp. App-24-App-26).

[39] Petitioners also asserted two other issues not relevant to this appeal; one involved the propriety of the court's disqualification of Petitioners' first attorney, and the other involved the propriety of the court's entry of default judgment against parties who had not appeared. *See In re Estate of Jones*, No. M2002-03073-COA-R3-CV, 2004 Tenn. App. LEXIS 126, at *5 (Tenn. Ct. App. Feb. 25, 2004) (Petition App. A, p. App-6).

[40] *See id.* at *5-6 (Petition App. A, p. App-6).

[41] *See id.* at *9-10 (Petition App. A, p. App-9).

[42] *See id.* at *10 (Petition App. A, p. App-9).

[43] *See* Appellants' Petition for Rehearing (Petition App. E, p. App-61).

comment.[44] Petitioners proceeded to petition the Tennessee Supreme Court for permission to file a discretionary appeal, reasserting their due process claims.[45] The Tennessee Supreme Court denied the petition without comment.[46] This Petition followed.

REASONS FOR DENYING THE PETITION

I. No Federal Issues Have Been Presented

Petitioners attempt to invoke the jurisdiction of this Court through 28 U.S.C. § 1257.[47] 28 U.S.C. § 1257 provides, in pertinent part:

> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

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[44] *See In re Estate of Jones*, No. M2002-03073-COA-R3-CV, 2004 Tenn. App. LEXIS 198, at *2 (Tenn. Ct. App. March 29, 2004) (Petition App. B, pp. App-12-App-13).

[45] *See* Appellants' Application for Permission to Appeal (Petition App. F, p. App-89).

[46] *See In re Estate of Jones*, No. M2002-03073-SC-R11-CV (Tenn. Dec. 5, 2005) (Petition App. C, p. App-16).

[47] *See* Petition, pp. 1-2.

None of the issues presented for review constitutes a federal issue, and therefore, U.S.C. § 1257 does not confer jurisdiction over this matter.

Unlike review of federal court decisions, this Court's review of state court decisions is not supervisory in nature.[48] This Court has acknowledged that it is not within its province to second-guess the correctness of a state court's factual findings and interpretation and application of its own state's laws.[49]

> It is not our province to inquire whether the conclusion reached and announced by the [state court] was or was not correct, for we are not passing upon its judgment as a court of error, nor can we consider the contention that the decision was not in harmony with the state constitution and laws.[50]

Rather, this Court's review of state court decisions is "confined to evaluating it in relation to the Federal Constitution."[51] In the case at bar, although Petitioners have veiled their questions in "due process" terms, Petitioners

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[48] *Chandler v. Florida*, 449 U.S. 560, 570, 101 S. Ct. 802, 807, 66 L. Ed. 2d 740 (1981) ("This Court has no supervisory jurisdiction over state courts . . . ").

[49] *See Howard v. Kentucky*, 200 U.S. 164, 173, 26 S. Ct. 189, 191, 50 L. Ed. 421 (1906) ("We cannot assume error in the decision of the court of appeals. We accept it, as we are bound to do, as a correct exposition of the law of the state, – common, statutory, and constitutional."); *Int'l Longshoremen's Assoc. v. Davis*, 476 U.S. 380, 387, 106 S. Ct. 1904, 1910, 90 L. Ed. 2d 389 (1986) ("[W]e have no authority to review state determinations of purely state law.").

[50] *Ex parte* Converse, 137 U.S. 624, 631, 11 S. Ct. 191, 193, 34 L. Ed. 796 (1891).

[51] *Chandler v. Florida*, 449 U.S. 560, 570, 101 S. Ct. 802, 807, 66 L. Ed. 2d 740 (1981).

are actually seeking to have this Court reevaluate the facts and reapply Tennessee law.

Questions 1(a) and (b), as set forth in the Petition, address the propriety of the Tennessee trial court's entry of a consent judgment in the underlying will contest[52] and the Tennessee Court of Appeals' affirmance of that decision.[53] Petitioners assert that their due process rights were violated because the trial court and Court of Appeals misstated the facts, the law, or both.[54] The question presented is more accurately phrased: "Did the Tennessee trial court and Court of Appeals err in their findings of fact and interpretations of Tennessee law, thereby violating Petitioners' due process rights?"

Petitioners allege that they had withdrawn their consent to the settlement before it was sanctioned by the court and that, pursuant to Tennessee law, their withdrawal of consent was timely and prevented entry of the consent judgment.[55] The trial court disagreed and found that the settlement had been sanctioned by the court

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[52] In Question 1(a), Petitioners complain that the trial court violated their rights to due process by entering a consent judgment because (i) there was well-established Tennessee law allowing a party to withdraw his consent to settlement, (ii) Petitioners communicated their withdrawal before the judge exercised his power to enter the consent judgment, and (iii) no notice was taken of the Tennessee law that allowed a party to withdraw from a settlement agreement. Petition, pp. i-ii.

[53] In Question 1(b), Petitioners complain that the Court of Appeals violated their due process rights by affirming the trial court's decision, "inaccurately pretending that the judge had approved the settlement at an earlier stage . . . " *Id.* at ii.

[54] *Id.* at 15.

[55] *See id.* at pp. 7-10.

before Petitioners attempted to withdraw their consent, and thus, pursuant to Tennessee law, the settlement was binding and entry of final judgment was proper.[56] After reviewing the case *de novo*, the Court of Appeals agreed with the trial court and affirmed the judgment.[57]

Petitioners request this Court to reevaluate the facts and reapply Tennessee law in order to hold, ultimately, that Petitioners' version of the facts and interpretation of Tennessee law is right and the Tennessee courts were wrong.[58] It is not within the province of this Court, however, to reevaluate factual findings and to independently interpret state law.[59] Thus, this issue is not properly before this Court.

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[56] *See In re Estate of Jones*, No. 98P-1344 (Tenn. Cir. Ct., Prob. Div., Nov. 14, 2002) (Petition App. D, p. App-23).

[57] *See In re Estate of Jones*, No. M2002-03073-COA-R3-CV, 2004 Tenn. App. LEXIS 126, at *5-6, 10 (Tenn. Ct. App. Feb. 25, 2004) (Petition App. A, pp. App-6, App-9).

[58] Petitioners request "a demonstration that the intermediate appellate opinion either misstated the facts or misstated state law." Petition, p. 15.

[59] *See, e.g., Ex parte* Converse, 137 U.S. 624, 631, 11 S. Ct. 191, 193, 34 L. Ed. 796 (1891) ("It is not our province to inquire whether the conclusion reached and announced by the supreme court was or was not correct, for we are not passing upon its judgment as a court of error, nor can we consider the contention that the decision was not in harmony with the state constitution and laws."); *Howard v. Kentucky*, 200 U.S. 164, 173, 26 S. Ct. 189, 191, 50 L. Ed. 421 (1906) ("We cannot assume error in the decision of the court of appeals. We accept it, as we are bound to do, as a correct exposition of the law of the state, – common, statutory, and constitutional."); *Chandler v. Florida*, 449 U.S. 560, 570, 101 S. Ct. 802, 807, 66 L. Ed. 2d 740 (1981) ("This Court has no supervisory jurisdiction over state courts, and, in reviewing a state-court judgment, we are confined to evaluating it in relation to the Federal Constitution."); *Int'l Longshoremen's Assoc. v. Davis*, 476 U.S.

(Continued on following page)

Questions 1(c), 1(d), and 2, as set forth in the Petition, address the propriety of the Tennessee Court of Appeals' and Tennessee Supreme Court's refusals to grant Petitioners further appellate review. The issues presented by these three questions are more accurately phrased: "Were Petitioners denied due process because they were denied additional and discretionary appellate review, where the issue sought to be reviewed was raised for the first time in their Petition for Rehearing to the Tennessee Court of Appeals?"

Petitioners allege that, by proper pleading, they brought an alleged due process violation to the attention of the Tennessee Court of Appeals and Tennessee Supreme Court and that the courts denied them due process by refusing to address the issue. However, Petitioners failed to raise their due process claim at the trial level or in their original appellate brief,[60] and pursuant to Tennessee appellate procedure, they had thereby waived the claim.[61] Though neither court issued an opinion explaining its decision to deny additional review, this Court's precedent provides that

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380, 387, 106 S. Ct. 1904, 1910, 90 L. Ed. 2d 389 (1986) ("[W]e have no authority to review state determinations of purely state law.").

[60] Petitioners concede this point at Petition, pp. 3-4.

[61] Tennessee appellate procedure provides that issues not raised at the trial level are generally waived, and issues not raised until an appellate petition for rehearing are definitely waived. *See Harrison v. Schrader*, 569 S.W.2d 822, 828 (Tenn. 1978) ("In civil cases, this Court will not, as a general rule, pass upon any question raised for the first time on appeal; nor will we consider on rehearing that which was not at issue in the original hearing.") (citing other Tennessee Supreme Court cases and Tenn. R. App. Proc. 32) (internal citations omitted).

the courts' silence should be interpreted as an expression that the issue was waived.[62]

Regardless of whether or not the courts explained their reasoning for denying additional review, the decision to grant or deny appellate review is left to the states and should not be disturbed by the United States Supreme Court.[63] Thus, this issue is also one of state law and is not properly before this Court.

II. Any Federal Questions Implicit in the Petition Were Waived Because They Were Not Addressed by or Properly Presented to the State Courts

Setting aside the findings of fact and interpretations of state law, which are outside this Court's jurisdiction, the only federal question that Petitioners could have raised is

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[62] *See Adams v. Robertson*, 520 U.S. 83, 86-87, 117 S. Ct. 1028, 1029, 137 L. Ed. 2d 203 (1997) ("When the highest state court is silent on a federal question before us, we assume that the issue was not properly presented, and the aggrieved party bears the burden of defeating this assumption, by demonstrating that the state court had 'a fair opportunity to address the federal question . . . '") (internal citations omitted).

[63] *Wagner Electric Mfg. Co. v. Lyndon*, 262 U.S. 226, 232, 43 S. Ct. 589, 591-92, 67 L. Ed. 961 (1923) ("[T]he question of the right to transfer was a question of Missouri law, upon which we are bound to accept the decision of the Missouri courts."); *see also Ohio v. Akron Metro. Park Dist.*, 281 U.S. 74, 80, 50 S. Ct. 228, 231, 74 L. Ed. 710 (1930) ("[T]he state was free to establish the limitation in question in relation to appeals to its Supreme Court in accordance with its views of state policy."); *Wolfe v. North Carolina*, 364 U.S. 177, 195, 80 S. Ct. 1482, 1492, 4 L. Ed. 2d 1650 (1960) ("Without any doubt it rests with each State to prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise.").

whether Tennessee law itself violates due process by allowing entry of judgment after a settlement agreement is sanctioned by the court or by denying rehearing or discretionary review because of the procedural bar of waiver.[64] However, Petitioners have not raised these arguments. Further, even if such arguments could be found to be implicit in the Petition for Writ, they were not addressed by or properly presented to the state courts and are, thus, not properly before this Court.

The Supreme Court of the United States "will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision [it has] been asked to review."[65] To show that an issue was "properly presented," a petitioner must show that he complied with the applicable rules of the state's appellate procedure.[66]

In the case at bar, the Petitioners did not present a due process argument or any other federal question to the trial court or to the Court of Appeals in their original brief. As discussed above, Petitioners raised their due process

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[64] *See Howard v. Kentucky*, 200 U.S. 164, 173, 26 S. Ct. 189, 191, 50 L. Ed. 421 (1906) (after declining to assess the state court's interpretation of its own law, the only question left for the U.S. Supreme Court is whether "state law, as applied, afford[ed] plaintiff in error due process"); *see also Walker v. Sauvinet*, 92 U.S. 90, 23 L. Ed. 678 (1875) ("Our power over [state] law is only to determine whether it is in conflict with the supreme law of the land, – that is to say, with the Constitution and laws of the United States.").

[65] *Adams v. Robertson*, 520 U.S. 83, 86, 117 S. Ct. 1028, 1029, 137 L. Ed. 2d 203 (1997). The Court has stated that this rule applies "with very rare exceptions," none of which applies here. *Id.*

[66] *Id.*, 520 U.S. at 87-88, 117 S. Ct. at 1030.

claims *for the first time* in their Petition for Rehearing.[67] Pursuant to Tennessee law, Petitioners' claims were untimely and were barred.[68] The Tennessee Court of Appeals denied rehearing without discussion.[69] The Tennessee Supreme Court denied discretionary review.[70]

Petitioners argue, of course, that there is "no need to invoke constitutional prohibitions ... until the state's judiciary has knowingly acted in violation of Tennessee law in determining litigation – until that point is reached, it is adequate simply to expound applicable Tennessee law with the expectation that the court will follow the law."[71] However, to the extent that Petitioners were deprived of property, the deprivation occurred at the trial court level upon entry of the consent judgment. The facts and events upon which Petitioners now base their due process argument are the same facts and events that supported their

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[67] Petitioners concede this point at Petition, pp. 3-4.

[68] Tennessee appellate procedure provides that issues not raised at the trial level are generally waived, and issues not raised until an appellate petition for rehearing are definitely waived. *See Harrison v. Schrader*, 569 S.W.2d 822, 828 (Tenn. 1978) ("In civil cases, this Court will not, as a general rule, pass upon any question raised for the first time on appeal; nor will we consider on rehearing that which was not at issue in the original hearing.") (citing other Tennessee Supreme Court cases and Tenn. R. App. Proc. 32) (internal citations omitted).

[69] *In re Estate of Jones*, No. M2002-03073-COA-R3-CV, 2004 Tenn. App. LEXIS 198 (Tenn. Ct. App. March 29, 2004) (Petition App. B, pp. App-12-App-13). The court's silence may be presumed to be an expression that the claim was not properly presented. *See Adams v. Robertson*, 520 U.S. 83, 86-87, 117 S. Ct. 1028, 1029, 137 L. Ed. 2d 203 (1997).

[70] *In re Estate of Jones*, No. M2002-03073-SC-R11-CV (Tenn. Dec. 5, 2005) (Petition App. C, pp. App-16-App-17). Again, the court's silence may be presumed to be an expression that the claim was not properly presented. *See Adams*, 520 U.S. at 86-87, 117 S. Ct. at 1029.

[71] Petition, p. 3.

objections at the trial court level and in their original brief to the Tennessee Court of Appeals. The only thing that has changed is Petitioners' characterization of the error. Where "[t]he same ground of objection ha[s] been raised throughout the proceedings, but solely as a matter of state law," and is only turned into a federal issue upon petition for rehearing, this Court has found that the claim "must be dismissed for failure to make seasonably the federal claim."[72]

The end result is that any true federal questions that could be implicitly read into the pending Petition for Writ of Certiorari were not addressed or properly presented to the Tennessee appellate courts and are, thus, not properly before this Court.

III. Petitioners' Due Process Rights Have Not Been Violated

Even if this Court were to find that the Petition raises a federal question and that it is properly before this Court, the Petition should be denied because any claim that Petitioners' due process rights were violated is simply without merit. The essence of the right to procedural due process is that, before being deprived of a constitutionally-protected property right, a party must be provided with "the opportunity to be heard 'at a meaningful time and in a meaningful manner.'"[73] Due process does not guarantee,

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[72] *American Surety Co. v. Baldwin*, 287 U.S. 156, 163-64, 53 S. Ct. 98, 100-101, 77 L. Ed. 231 (1932).

[73] *Matthews v. Eldridge*, 424 U.S. 319, 333, 96 S. Ct. 893, 902, 47 L. Ed. 2d 18 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S. Ct. 1187, 1191, 14 L. Ed. 62 (1965)).

in each instance, the right to a jury,[74] the right to a trial on the merits,[75] or the right to an appeal.[76] Rather, "'[d]ue process is flexible and calls for such procedural protections as the particular situation demands.'"[77] Further, procedural due process rights can be waived.[78] In the case at bar, Petitioners were provided with notice and a meaningful opportunity to participate and be heard, as was reasonable under the circumstances. Any further procedures they were due were waived by their voluntary consent to the settlement agreement.

To determine if certain judicial procedures comply with the mandates of due process, this Court has traditionally balanced three distinct factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including

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[74] *See, e.g., Walker v. Sauvinet*, 92 U.S. 90, 92-93, 23 L. Ed. 678 (1875); *Wagner Electric Mfg. Co. v. Lyndon*, 262 U.S. 226, 232, 43 S. Ct. 589, 591, 67 L. Ed. 961 (1923).

[75] *See, e.g., Boddie v. Connecticut*, 401 U.S. 371, 378, 91 S. Ct. 780, 786, 28 L. Ed. 2d 113 (1971).

[76] *See, e.g., Ohio v. Akron Metro. Park Dist.*, 281 U.S. 74, 80, 50 S. Ct. 228, 230, 74 L. Ed. 710 (1930) ("[T]he right of appeal is not essential to due process, provided that due process has already been accorded in the tribunal of first instance.").

[77] *Id.* (quoting *Morrisey v. Brewer*, 408 U.S. 471, 481, 92 S. Ct. 2593, 2600, 33 L. Ed. 2d 484 (1972)).

[78] *See, e.g., Boddie*, 401 U.S. at 378-79, 91 S. Ct. at 786; *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 185, 92 S. Ct. 775, 782, 31 L. Ed. 2d 124 (1972) ("The due process rights to notice and hearing prior to civil judgment are subject to waiver.").

> the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[79]

In the present case, the private interest affected was not even a vested property interest. The only way the Petitioners stood to gain anything from the probate proceedings was in the unlikely event that four of the most recent five wills were invalidated or if all five wills, executed over a twenty-four year period, were deemed invalid.[80] Even if this were to occur, Petitioners' shares of the estate would have been marginal compared to those of the other parties to the proceeding.[81]

Further, the procedures employed by the probate court did not pose a high risk of an erroneous deprivation of property. Quite the contrary, the probate court went to great lengths to provide Petitioners with a fair opportunity to be heard. The court set aside a default judgment that had entered against Petitioners due to their failure to timely appear in the case.[82] This allowed Petitioners to participate fully in all aspects of the will contest. For their

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[79] *Matthews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 903, 47 L. Ed. 2d 18 (1976).

[80] Petitioners conceded this point in their original brief to the Tennessee Court of Appeals, in which they provide a breakdown of which parties would recover and the amounts they would recover under each of the disputed wills. *See* Tennessee Court of Appeals Brief of Appellants Raymond Burnett and Evie Moore (Attached App. 1, pp. A6-A8); *see also* Tennessee Court of Appeals Brief of Appellees Sonnie E. Potts et al. (Attached App. 2, pp. A36-A37).

[81] For example, under the 1974 will, Petitioners each stood to take 2.08% of the estate. *Id.*

[82] *In re Estate of Jones*, No. M2002-03073-COA-R3-CV, 2004 Tenn. App. LEXIS 126, at *3 (Tenn. Ct. App. Feb. 25, 2004) (Petition App. A, p. App-4).

convenience, Petitioners were allowed to participate by telephone in the settlement negotiations.[83] The settlement negotiations were put on hold so that Petitioners' counsel could communicate the proposed settlement to Petitioners and confer with them overnight.[84] Only after Petitioners consented to the settlement, the settlement was sanctioned by the court, and all parties relied upon the settlement, did Petitioners attempt to withdraw their consent.[85] At this point, the probate court found that the settlement agreement was enforceable and entered final judgment.[86]

It is difficult to imagine what additional procedures the probate court was required to afford Petitioners. Short of allowing Petitioners to rescind their consent ten days after the court sanctioned the settlement agreement, the trial court afforded Petitioners with every opportunity to participate in the litigation. Any other judicial procedures available to Petitioners were waived by their knowing and voluntary consent to the settlement agreement.

Allowing Petitioners to withdraw their consent after the settlement was agreed to by all parties and sanctioned by the court would undermine Tennessee's compelling interest in promoting alternative dispute resolution ("ADR"). ADR has become an increasingly necessary and important component of the judicial system. States have

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[83] *See* Tennessee Court of Appeals Brief of Appellees Sonnie E. Potts et al. (Attached App. 2, p. A38).

[84] *See id.*

[85] *In re Estate of Jones*, No. 98P-1344 (Tenn. Cir. Ct., Prob. Div., Nov. 14, 2002) (Petition App. D, p. App-23).

[86] *Id.* (Petition App. D, pp. App-23-App-26); *In re Estate of Jones*, No. M2002-03073-COA-R3-CV, 2004 Tenn. App. LEXIS 126, at *3-4 (Tenn. Ct. App. Feb. 25, 2004) (Petition App. A, pp. App-4-App-5).

an interest in relieving the overwhelmed dockets of the trial courts by promoting amicable settlements between the parties. Allowing a party to withdraw his consent after a settlement is reached and sanctioned by the court would dramatically impair the alternative dispute process. The greatest incentive parties have to make concessions in their demands is the possibility for a swift and final end to the litigation. If parties were allowed to withdraw their consent after a settlement is reached and sanctioned by the court, this incentive would be destroyed and the effectiveness of ADR would be significantly undermined. The state's interest in promoting judicial economy by promoting ADR is compelling in this case.

IV. None of the Rule 10 Factors Compelling this Court to Grant Review Is Present

As a final note, Respondents submit that none of the factors set forth in Supreme Court Rule 10 as reasons compelling this Court to grant review is present in this case.[87] The underlying opinion was not rendered by a

[87] SUP. CT. R. 10 provides, in pertinent part:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers: (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power; (b) a state court of last resort has decided an important federal question

(Continued on following page)

United States Court of Appeals, so none of the Rule 10(a) factors apply. Although one of the opinions being complained of was rendered by Tennessee's highest court, it did not involve a federal question, nor did it conflict with another state supreme court or United States Court of Appeals. Thus, Rule 10(b) does not apply. Finally, because the decision being complained of does not involve an issue of federal law and is not in conflict with the precedent of this Court, Rule 10(c) does not apply. Even if the issues presented were properly before this Court, they are simply not issues of sufficient import to warrant this Court's review.

CONCLUSION

The Petition should be denied because it raises only state questions of law directly, and any implicit federal questions were not properly presented to the state courts and were thereby waived. Further, Petitioners were allowed a meaningful opportunity to participate and be heard. Any additional procedures that may have been due were waived when Petitioners voluntarily consented to the settlement agreement. Finally, none of the factors set forth by this Court as compelling reasons for granting review is present in this case.

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in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals; (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

For all of the foregoing reasons, Respondents, Sonnie and Virginia Potts, respectfully request that the Petition for Writ of Certiorari to the Tennessee Court of Appeals be denied.

Respectfully submitted,

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APPENDIX 1

Tennessee Court of Appeals
Brief of Appellants
Raymond Burnett & Evie Moore

IN THE TENNESSEE COURT OF APPEALS
FOR THE MIDDLE SECTION, AT NASHVILLE

IN RE: ESTATE OF ERIN MURRAY JONES, DECEASED	)	No. M2002-03073-COA-R3-CV
APPEAL OF RAYMOND BURNETT AND EVIE MOORE, *Contestants-Appellants*	)	Davidson Co. Circuit Court, Part VII, No. 98P-1344

BRIEF FOR CONTESTANTS-APPELLANTS

I.

Issues Presented for Review

1. Whether the trial Court erred in approving a settlement agreement disposing of all issues after the Appellants (Co-contestants of contested wills and proponent of Decedent's earliest will) had withdrawn their agreement to the settlement, and whether the terms of the order approving the settlement were within the Court's jurisdiction to enter.

2. Whether the trial Court erred in proceeding, as the terminal part of the settlement-approval hearing, with the first step of the will contest litigation, admitting evidence and then admitting to probate Decedent's final (1998) purported will when – (a) at the same hearing, the Court permitted Contestants-Appellants' new counsel to withdraw, and failed to continue the hearing to give Appellants time to locate and employ new counsel, and (b) in so ruling without intervention of a jury, when jury demands had been made in the will-contest petitions.

3. Whether the trial Court erred in removing Appellants' original counsel from participating in the case on the ground of conflict of interest, where their co-contestant, Kimberly Laura McGowan Ingram, filed a new will contest petition through new counsel, contesting the Decedent's 1998 will, but not contesting earlier wills which Appellants continued to contest, such not presenting a conflict of interest.

4. Whether the trial Court erred in applying to statutory will-contest proceedings the Tennessee Rules of Civil Procedure regarding default judgments for non-appearance.

II.

Statement of the Case

Nature of the Case:

The case is a will-contest case which arose from a series of will-contest complaints by different heirs and/or legatees, asserting the invalidity of each of a series of purported wills (hereinafter, "wills")[1] offered for probate in the Probate Division of the Davidson County Circuit Court.

Course of Proceedings:

The case began with a, probate petition filed in the Davidson County Circuit Court, Probate Division, after the death of the Decedent, who had no heirs at law other

[1] Each of these, for reading ease, is hereinafter referred to simply as a "will," without any attempted indication of validity or invalidity.

than living nieces, nephews, and the children of those deceased, with the first petition being followed by petitions to probate other wills and by objections and/or formal Will Contest Complaints. Copies of the wills were filed with the probate petitions, these being, in inverse order from the most recent to the earliest, a holographic will executed in 1998 (R., 17-18) and previous typewritten, witnessed wills: two wills, identical in terms, executed June 4, 1996 (R., 4-7) and October 28, 1996 (R., 8-11) one executed May 3, 1993 (R., 429-431), and a much-earlier one executed in 1974 (R., 656-659).

Because this appeal concentrates upon a settlement hearing and actions Appellants consider prejudicial to them at the pre-settlement stage, it is unnecessary to summarize all of the procedural steps, which were long and complex. It is sufficient to mention some high points without reference to the numerous motions and interlocutory orders, which included rulings upon summary judgment motions. These procedural steps included (*i*) the actions of the Probate Judge in appointing an administrator *ad litem,* and later recusing himself because his former law partner drew the 1993 will, causing reassignment to another Circuit judge who (*ii*) entered default judgments against all heirs, legatees and devisees who had not appeared (R., 255-256), ordered the Administrator *ad litem* removed from his position (R., 262-263), later set aside that order,. noted that settlement efforts had been unsuccessful, and recused herself from the ease (R., 301-302), (*iii*) leading to reassignment of the case back to the Probate Judge (R., 305), who later (*iv*) set aside the. default judgments (R., 313) (which permitted intervention by Appellants), then in June, 2002, entered an order disqualifying Appellants' attorney who had represented them from

the beginning (R., 710), and finally, conducted settlement conferences which culminated in the final hearing,[2] then entered the appealed order of November 14, 2002. This order approved a settlement agreement joined by all parties but Appellants. It admitted the 1998 will to probate and directed distribution of the estate's assets in accordance with the provisions of the settlement agreement (R., 1150).

Procedural steps by Appellants (who are among Decedent's numerous nieces and nephews) included their answers to an amended petition to probate the 1993 will (R., 316-321) and to the petition to probate the 1996 wills (R., 322-324), as well as their own will contest complaint (R., 325-330), in which they were joined by two other contestants represented by the same attorney, being a nephew who later non-suited (R., 705, 711), and a grandniece, Kimberly McGowan Ingram, daughter of a principal legatee under the two 1996 wills, Mary Flora McGowan. Much later, Contestant Ingram employed other counsel, filed a motion to disqualify Appellants' (and her own prior) attorney, and later filed her own will contest complaint against the 1998 will (in which she was a named legatee) (R., 707), her amended answer withdrawing her objections to the 1996 wills (R., 703), and other pleadings. On October 18, 2002, Ingram's new attorneys took the lead in addressing a letter to the Probate Court Judge concerning settlement possibilities (R., 1206-1207), which led to settlement proceedings and to the final settlement-approval order.

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[2] It was during this hearing that the Court permitted Appellants' new substitute counsel to withdraw from representing them and refused to give them time to find and employ new counsel (summarized *infra*, pp. 6-7).

Many other pleadings and much other court activity not relevant to this appeal occurred in preparation for trial.

Disposition in the Court Below:

Disposition. was by the Court's orders entered November 5, 2002 (R., 1147), effectuating a ruling made during the final hearing which allowed withdrawal of Appellants' second attorney (R., Vol. XI, Transcript of November 4, 2002 hearing), and the final November 14, 2002 order (R., 1150-1171, including attached settlement agreement), approving the settlement agreement and, in accordance therewith, dismissing all will contests, admitting the 1998 holographic will to probate, and directing distribution of the estate in accordance with the settlement agreement's terms.

III.

Statement of the Facts

The principal facts concerning the main issue herein appear in the Transcript of the Proceedings of November 4, 2002 (R., Vol. VI, pp. 1-42), the most important parts of which are summarized below.

Legal Estate-Disposition Alternatives:

For better understanding of the inter-relationships, Appellants first summarize parts of the various wills with identification of the principal beneficiaries who are parties hereto:

The 1998 Holographic Will (R., 17-18) had as its principal beneficiaries Decedent's nephew, Sonny E. Potts, to receive 4 listed real properties including

the home on Summerly Drive in Nashville and one-half of the residuary estate, with the other one-half of the residuary estate going to his wife, Virginia S. Potts. Twelve grand-nieces and -nephews, including Kimberly McG. Ingram, were to receive $25,000.00 each (or possibly jointly, subject to construction), and there were no other bequests.

The 1996 Wills (R., 4-11) each devised two rental-properties to Sonnie E. Potts, and left the residuary estate to each of two nieces, one-half to Mary Flora McGowan (mother of Kimberly McG. Ingram.) and one-half to Lucy DePriest, with no bequest to Kimberly McG. Ingram or any other relatives, the only other bequests, totaling $75,000.00, to three charities and $25,000.00 to Floyd Mason, a personal friend.

The 1993 Will (R., 429-431) had as its principal beneficiary Sonny E. Potts to receive the entire residuary estate, with the residuary to go instead to his wife, Virginia S. Potts, if Potts should pre-decease the Decedent. The bequests were a certificate of deposit to Grand-Nephew Archie F. Potts, cash bequests totaling $30,000.00 to two of the charities named in the 1996 wills, and $10,000.00 to Decedent's friend Floyd Mason, to go to Sonny Potts should Mason pre-decease her.

The 1974 Will (R., 656-659) left shares, the largest individual share, 25%, each to her grand-niece, Erin Elizabeth Potts (otherwise favored in only the 1998 holographic will) and her grand-nephew, Archie F. Potts (to receive the certificate of deposit under the 1993 will), smaller shares of 12½% each to the niece, Mary Flora McGowan and her daughter, Kimberly McG. Ingram, 6¼% each to nephew Sonny E. Potts (the heir mainly favored in the 1993 and 1998 wills) and grand-nephew Sonny W. Potts, with the remaining 12½% divided between Lucy DePriest (favored in

the 1996 wills), Appellants Moore[3] and Raymond Burnett, and three other relatives not mentioned in any other will.

The Heirs at Law, in default of any valid will, are listed in each of the separate probate petitions (*e.g.*, R., 1), and are restricted to the surviving nieces and nephews and the children of each deceased niece or nephew. These would include Lucy DePriest, Mary Flora McGowan, Evie Moore, Sonnie E. Potts, and Raymond Burnett.

The approved settlement (R., 1150-1171), signed by counsel for all parties except the Appellants, provided, for $25,000.00 to each of the 12 grand-nieces and -nephews named for such a bequest in the 1998 holographic will, including Kimberly McG. Ingram, gave Kimberly McG. Ingram the decedent's Summerly Drive home, provided that a certificate of deposit bearing the names of the decedent and Sonnie E. Potts should go jointly to Sonnie E. Potts and his wife, Virginia S. Potts, and disposed of the larger residuary estate in shares, 48% jointly to Sonnie E. Potts and his wife and the other 52% to the two sisters favored in the 1996 wills, 28% to Mary Flora McGowan and 24% to Lucy DePriest.

The Settlement-Approval Hearing:

As summarized by the Court during the final hearing held Monday, November 4, 2002, that hearing was preceded by a Settlement Conference on October 21, 2002 (R.,

[3] Then Evie Burnett Overstreet.

XI:16),[4] in which all parties agreed to waive any objection and consent to the Trial Judge acting as Settlement Judge (R., XI:10, ll. 9-11), followed by a group discussion with the Settlement Judge and all parties' attorneys, then by separate discussions between groups, then agreement thereto before the Settlement Judge to by all parties *except* Appellants' replacement attorney, Roger Smith,[5] who said he would have to confer with his clients before he could agree (R., XI:11, ll. 14-21). Roger Smith telephoned the Settlement Judge at 10:45 a.m. the next day, and when they talked later that day, Mr. Smith told the Judge that his clients had agreed to the settlement proposal, which would pay them $30,000.00 jointly toward payment of their attorney-fee costs (R., XI:11.). By telephone, the Settlement Judge confirmed with Attorney Day (representing Sonny E. and Virginia Potts) that Smith had conveyed this message to him (R., XI:11-12).[6] In the Court's summary, the Court then commented that as Settlement Judge, he found this "pretty compelling" in combination with the Settlement Conference "request of other litigants that I force [Appellants] Evie Moore and Raymond Burnett [who reside in Florida] to come to Nashville for a second settlement conference . . ." (R., XI:12, ll. 10-13).

At conclusion of the Court's summary, the attorneys for all agreeing parties confirmed that the Court's summary was

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[4] Such references are to Volume XI of the Record, the transcript of proceedings on November 4, 2002, followed by references to the pagination thereof, and sometimes to lines.

[5] So referred to hereinafter because, as the Court noted, the case had two attorneys named Smith.

[6] Mr. Day confirmed this in open court, and volunteered that he had telephoned and conveyed the "good news" to Ingram's attorney, Mr. Bill Harbison (R., XI:12, ll. 1-4).

accurate, and Roger Smith, following the Court's suggestion, made the response that he was there at the conference, otherwise, "No comment," (R., XI:14, ll. 12-13), In regard to Attorney Roger Smith's obligations, the Court said, in part:

> " . . . Now if his clients have changed their mind and wish to not be bound by the settlement, he has a duty to advocate that position as well and would not be permitted to go forward with a settlement if his clients are kicking and screaming saying no, no, no. He can't do that."
>
> (R., XI:15, l. 24-16, l. 6).

In regard to Roger Smith's further participation, Appellant Burnett later testified that Mr. Smith said he couldn't handle the case, because it was too much for one attorney (R., XI:23), and that he had no objection to Mr. Smith being permitted to withdraw (R., XI:24, l. 10), but confirmed that both he and Evie Moore are legatees under the early (1973) will, they believe all four contested wills – 1993, both 1996 and 1998) are void and "feel like we have a right to our day in court to prove it." (R., XI:18). He asked that the case be continued for trial at a later date to give Appellants time to locate and retain other counsel (R., XI:20, ll. 20-25). During said Appellant's testimony, the Court commented that Appellants wouldn't have been able to even appear under representation by their original attorney, John E. Clemmons, to join in the will contest had the Court not set aside the default judgment entered against them (R., XI:21-22).

These occurrences in the November 4, 2002 hearing began shortly after the opening of the hearing, when the Court announced that it would first take up Attorney

Roger Smith's motion to withdraw. The Potts' Attorney Day objected to the withdrawal (R., XI:4), stating that unless the Court should rule there is a valid settlement (R., XI:6-7), then the case should go to trial before a jury as set for the following Wednesday, November 6, 2002 (R., XI:7-8). Attorney Day announced his clients' position that it was within the Courts power to both grant the Roger Smith withdrawal motion and approve the settlement agreement (R., XI:9, ll. 15-23).

Following these occurrences, the Court announced that the parties have a valid "settlement unless anyone objects . . . through a judicially sanctioned settlement conference . . . [done] the right way." (R., XI:25), In approving the wisdom of the settlement by those parties who agreed, the Court said:

> "If any case needs to be closed, this is one of them. And the acrimony has been just terrible. I must admit I've said on a few occasions to myself that if I could disinherit everybody in this case and give the money to the Salvation Army [not among the named charitable beneficiaries in the 1993 or 1996 wills), I would in a heartbeat. I can't say that I've been impressed with the actions of any of the litigants."

(R., XI:26, ll. 13-21).

The Court thereupon ruled that it had made the decision "establishing that this case is settled." (R., XI:27, ll. 17-18).

Removal of Appellants' Attorney Clemmons:

As shown in more detail in the argument, the order removing Appellants' attorney was done upon motion without any supporting affidavits, with the argumentative

statements on which the Court acted being set out in the argument (*infra,* pp.14-16), to avoid pointless duplication.

Interested Adversaries Shares:

For simplification, and to more clearly show the interest of each of the major adversaries, an approximation can easily be obtained by counting the principal disposable assets – as to these parties – as Decedent's Summerly Drive home,[7] as to which an inventory showed a valued at $160,700 (R., 238), and the liquid assets valued at $4,252,153.40. Inasmuch as any arbitrary figure could be adopted to show relative interests, the use of $4,000,000 for the liquid assets and $150,000 for the house, yields the following interest amounts by simple arithmetic:

Kimberly McG. Ingram	$25,000 under the 1998 will, nothing under the 1996 or 1993 wills, $520,000 under the 1974 will, nothing as an heir at law, and $185,000 under the settlement agreement.
Sonnie E. Potts	$2,010,000 under the 1998 will, nothing[8] under the 1996 wills, $4,060,000 under the 1993 will, $260,000 under the 1974 will, $231,111

[7] Other real properties are shown on the inventory as having insignificant value or having Sonny E. Potts or others named in the deeds, and may accurately be disregarded.

[8] Except his interests in the low-valued properties on which his name appeared on deeds.

	as an heir at law, and $1,920,000 (jointly with his wife) under the settlement.
Virginia S. Potts	$1,850,000 under the 1998 will, nothing under any of the other wills[9] or as heir at law, and $1,920,000 (jointly with her husband) under the settlement.
Mary McGowan	Nothing under the 1998 will, $2,042,500 under the 1996 wills $50,000 under the 1993 will, $520,000 under the 1974 will, $231,111 as an heir at law, and $1,120,000 under the settlement.
Lucy DePriest	Nothing under the 1998 will, $2,042,500 under the 1996 wills, $10,000 under the 1993 will, $8,667 under the 1974 will, $346,667 as an heir at law and $960,000 under the settlement.
Raymond Burnett	Nothing under the 1993, 1996, or 1998 wills, $8,667 under the 1974 will, $346,667 as an heir at law, and $15,000 under the settlement ($30,000 shared with his sister).

[9] Except that if predeceased by her husband, Sonnie E. Potts, she would receive his entire $4,060,000 under the 1993 will.

Evie Moore	Nothing under the 1993, 1996, or 1998 wills, $8,667 under the 1974 will, $346,667 as an heir at law, and $15,000 under the settlement ($30,000 shared with her brother).

IV

Argument

The trial Court erred in approving a settlement agreement disposing of all issues after the Appellants (Co-contestants of contested wills and co-proponents of Decedent's earliest will) had withdrawn their agreement to the settlement, and absent settlement order the Court was empowered to approve, the Court lacked jurisdiction to enter the order as a judgment.

As shown above, the Trial Judge acted as Settlement Judge (with the consent of all parties) in a Settlement Conference conducted on October 21, 2002, then returned to his status as Trial Judge to hear at least one motion on November 4, 2002, during the course of which he acted upon a written settlement agreement derived through Settlement Conference procedures, whose events he made a part of the record by recital of the same (*supra*, pp.6-8).

Hence the November 4, 2002 hearing was based upon Settlement Conference proceedings which now came back before the same judge as Trial Judge, with settlement not having been communicated in open court but merely by telephone following a day's negotiations. Based upon the Supreme Court's earlier decision in *Harbour v. Brown*, 732 S.W.2d 598 (1987), and that Court's promulgation of

Supreme Court Rule 31 governing settlement negotiations and agreements reached under judicial oversight, this Court thoroughly expounded the governing law in *Environmental Abatement, Inc. v. Astrum R. E. Corp. v. Mahan Roofing, etc.*, 27 S.W.3d 530 (Tenn.App., MS., 2000). Without unnecessary quotations, that decision held a party agreeing to such a settlement can withdraw his consent at any time before its judicial approval, which can be given only on the record in open court,[10] and that the Trial Judge has no authority to approve such a settlement unless all litigants are still in agreement to the settlement **at the time of approval** (27 S.W.3d, at 538).[11]

With this Court's determination that a party agreeing orally to any such judicially-overseen settlement may withdraw his assent as of right "because it was not made 'on the record' or 'in open court.'" (*Ibid.*, at 541), the consequence is that any post-withdrawal order approving such a settlement is without authority and "the case remains unsettled." (*Ibid.*, at 542). Hence, with telephonic post-hearing communication of consent to the Settlement Judge having been inadequate, and with it being indisputable that any "consent" given was withdrawn, before November 4, 2002, it follows that the Court's lacked legal

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[10] Holding that when an agreement is "made in the presence of the dispute resolution neutral (the settlement judge) and *not in the presence of a judge with authority to dispose of the case,* the agreement cannot be said to have taken place in 'open court.'" (27 S.W.3d at 541; emphasis added).

[11] Holding "that 'the power of the court to render a judgment by consent is dependent on the existence of the *consent of the parties at the time the agreement* **received the sanction of the court**. . .' *Harbour, 732 S.W.2d at 599*" (Bold-faced emphasis by this Court).

authority for its decision announced in open court on that date and entered in its minutes on November 14, 2002.

But Appellants insist – for good, practical, and important reasons – the order was not only without authority but it was beyond the Court's jurisdiction. Earlier decisions recognize this principle. At a time when statutes authorized a court to grant alimony only if it granted a wife the divorce, it was held to beyond a court's jurisdiction, and thus subject to collateral attack, to award alimony to a wife in a case in which the divorce was granted to the husband, *Brown v, Brown,* 198 Tenn. 600; 281 S.W.2d 492 (1955). When statutes providing for municipal annexation contests permitted only two possible decisions, either a decree upholding the annexation or one holding it void, a purported "final consent decree" making a different disposition was held beyond the Court's jurisdiction, requiring the conclusion that the ease, classified as closed on the trial court's docket, still remained open and subject for trial years later, so that the judgment, final in form and appearance, was not actually a valid final judgment. *City of Bluff City v. Morrell,* 764 S.W2d. 200 (Tenn., 1988)

So here, and so in any will-validity conflict in any court in Tennessee. When there is an old will, followed by a series of newer ones, each of which has a clause revoking all prior wills, as here, and they are attacked in will contest proceedings, the law authorizes only two possible outcomes: Either one of the wills is valid or all are void,[12]

[12] This is true because if each of the recent wills is void for undue influence or lack of testamentary capacity, their revocation clauses are also void, leaving the original will valid. If the most recent will is held void, but a less recent one is valid, its revocation clause will also be valid, so it will revoke the first will and all other earlier ones. So the

(Continued on following page)

so that the property may pass by law only by testamentary disposition or by intestate succession. Upon entry of a judgment admitting a will to probate, or a judgment holding there was no valid will *when death occurred,* the only possible distributions the Court has jurisdiction to direct are either in accord with a probated will or under the laws of intestate succession.

A different distribution is never possible except as it may come from shares of distributees identified as required by law, because it cannot come directly from the estate. This principal is illustrated by *Tate v. Camp*, 147 Tenn. 137, 245 S.W. 839 (1922), in which a will favoring some relatives was contested by the decedent's son, and the contest was settled by formal agreement, providing a distribution from estate assets quite different from that provided by the will. This was followed by dismissal of the will contest and then by disposition of the previously-pending proceedings to probate of the will in solemn form, now without opposition. Because the agreed asset distribution could come from no source other than legatees under the will, the son had contested the will, and the will provided, for disinheritance of any beneficiary who might contest the will, a recognized legally valid provision, this will construction case was then filed, upon stipulated facts, to determine if the contesting son was disinherited. In a very scholarly discussion (147 Tenn., at 147-156, 245 S.W. at 841-844), the Court demonstrated that Tennessee should adopt the minority exception, holding there should be no disinheritance where the beneficiary's contest was

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estate will pass under that recent will unless it be held that the valid recent will was also revoked by subsequent act, leaving the original will still revoked, resulting in intestacy.

well-grounded, because its purpose was to determine if the writing was actually the decedent's will, not "a mere vexatious act of a disappointed child or next of kin." (147 Tenn., at 152).

This fact that when agreed disposition actually differs from that required by the probated will or the intestate succession laws, whichever is applicable, its only possible source is transfer of the entitlement from those who inherited it, is confirmed by statutes. The Tennessee disclaimer statute, T.C.A. § 31-1-103, requires that for the new transferee to qualify as having received by inheritance instead of by transfer from the disclaiming heir, the transferee's entitlement must be by operation of law, *e.g.*, such interest most pass 'without any direction on the part of the person making the disclaimer" to beneficiaries determined by the statute itself, § 31-3-103(b)(4) or (c). Federal estate and gift tax law contains a similar disclaimer qualification statute to determine whether the source of the transfer is the estate itself, or from a legacy some individual beneficiary has already received from the estate, 26 U.S.C. § 2518.

The foregoing demonstrates that where court-ordered distribution is to be other than that provided by the applicable rule – either the provisions of a probated will or the law of intestate succession, then no Court has power to order it except by consent of all persons whose consent is required. Obviously, the consent required can never be less than the consent of all parties to the litigation who may possibly inherit through trial on the merits. Reason would suggest that where, as here, intestacy is possible, then consent of the non-participating heirs at law should be required for any court to have jurisdiction to order a distribution other than that required by law.

Hence, Appellants insist that the judgment was not only entered without legal authority, it, in the absence of the required consents, was entered wholly without jurisdiction, no less than were the apparent final judgments in *City of Bluff City v. Morrell* and *Brown v. Brown, supra,* p. 13..

The trial Court erred in proceeding, as the terminal part of the settlement-approval hearing, with the first step of the will contest litigation, admitting evidence and then admitting to probate Decedent's final (1998) purported will when – (a) at the same hearing, the Court permitted Contestants-Appellants' new counsel to withdraw, and failed to continue the hearing to give Appellants time to locate and employ new counsel, and (b) in so ruling without intervention of a jury, when jury demands had been made in the will-contest petitions.

This issue may be more academic than practical, but prudence dictates that it should be determined to safeguard against possible future insistence that the 1993 will probate evidence and order might stand alone as valid. Basically, without regard to representation and fair-trial rights, when an order based upon a settlement is achieved as done in this case, then "the case remains unsettled." *Environmental Abatement, Inc. v. Astrum R. E. Corp. v. Mahan Roofing, etc.*, 27 S.W.3d 530 (Tenn.App., M.S., 2000). As already discussed (*supra*, pp.10-11) this would seem to render the entire judgment void *ab initio,* equally invalidating that part which purported to admit the will to probate. This is no criticism of the trial court, because Appellees' counsel were all present, and either expressly consenting or not objecting to this procedure. It is always

the obligation of employed counsel to research matters before they bring them before a judge for decision.

Clearly, the purpose of hearing the testimony of witness as to Decedent's testamentary capacity and handwriting identification was not to conduct a common-form probate probate hearing, which would have been possible had all will contests previously been dismissed (see, *e.g.*, *infra,* pp.11-12), nor to commence trial of the will contest case, which was set for trial 2 days later.

Nevertheless, Appellant Burnett was present, consenting to the withdrawal of his attorney, Roger Smith,[13] insisting upon his right to his day in court, and requesting time to locate and employ other counsel.[14] As Attorney Roger Smith advised Appellant Burnett, this case is much too demanding to be handled by a single attorney (*supra,* p.7), Appellants clearly could not competently prosecute their cause *pro se* (if any human can), and Appellants should have been given time to employ counsel. *Fidelity-Phoenix Fire Ins. Co. v. Oliver,* 25 Tenn. App. 114, 152 S.W.2d 254 (Tenn.App., M.S., 1941, *Cert. den,* 1941) heavily relying upon *Brown v. Brown,* 86 Tenn. 277, 6 S.W. 869, 7 S.W. 640:

> "Where it is shown that defendant's attorney had withdrawn from the case, it is the duty of the court to continue the case a sufficient length of

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[13] Who spoke not a word for the protection of any rights of Appellants, despite the Court's comments (quoted *supra,* p.7) about his professional obligations of continued representation.

[14] The undersigned previously briefly represented Appellants' brother, John Burnett in his withdrawal from the case on June 14, 2002 (R., 705), but did not represent Appellants until shortly before December 12, 2002 (R., 1174, 1178).

> time to penult defendant to employ other counsel and to enable the new counsel to investigate the case and make defense. 13 C.J., 134, section 26; 17 C.J.S., Continuances, section 23."
>
> (25 Tenn.App., at 119, 15S S.W.2d, at 258).

Upon a direct appeal, denial of the right to counsel is surely adequate for Appellants' rescue from their predicament particularly when it was brought about by actions insisted upon by Appellees' counsel. Because of this denial, and because of the fact that the probate proceedings were conducted without a jury, although a jury had been demanded, the order admitting the will to probate should be vacated.

The trial Court erred in removing Appellants' original counsel from participating in the case on the ground of conflict of interest, when their co-contestant, Kimberly Laura McGowan Ingram, through new counsel, filed a new will contest petition contesting the Decedent's 1998 will, but not contesting earlier wills which Appellants continued to contest, such not presenting a conflict of interest.

It was extremely important to Appellants that they be allowed to be represented by the attorney of their choice, John E. Clemmons, who had unmatched familiarity with the complex details of this litigation through many months' representation, when the opposing litigants, as indicated by the Court's comments (*supra,* p. 8), had not been characterized by a showing of brotherly love. Although Appellants now have been compelled, twice, to employ substitute counsel, it is clear that Mr. Clemmons'

service would still be invaluable, either as counsel or as co-counsel, in trial of the case.

The ground upon which Ms. Ingram moved to disqualify her former attorney was conflict of interrest, both actual and in an "appearance of impropriety." (R., 660). This motion was unsupported by any affidavit. Her supporting brief quoted from the Disciplinary rules requiring a lawyer to discontinue "multiple employment" if representation of one might adversely affect his "representation of another client, . . . " (R., 663), which is precisely what Mr. Clemmons commendably did. Responding, Mr. Clemmons pointed out convincingly, and with considerable detail, his position that, before he assumed obligations to her, she had shared her secret knowledge with the world at large by conferences with all the other lawyers in the case (R., 666-672, particularly at 669), and that it was **she** who first made contact with him and brought Appellants to him as clients. These positions are clearly established by the record, but Ingram did not support her prayer for relief with affidavits, so as to bring facts before the court, as authorized by Rule 6.04 T.R.C.P., so there was no basis for the Court to order an evidentiary hearing. Unlike plants, courts do not gain knowledge through osmosis, but from evidence.

While a conflict in different clients' **objectives** may have impelled termination of the attorney-client relationship between Attorney Clemmons and Kimberly McG. Ingram, and while her mother, Mary McGowan, might be expected to develop hostility toward Mr. Clemmons as an opposing attorney, it seems clear there was no conflict of **interests**. An "interest" is by definition a "right, title, or legal share of something." (WEBSTER'S SEVENTH NEW COLLEGIATE DICTONARY, 1965).

Mr. Clemmons asked to withdraw from representing Ingram on April 10, 2002, because of a prospective conflict between the interests of herself, as a major legatee under the original 1974 will, and the Appellants, as minor legatees thereunder (R., 572). Ingram joined Appellants initially in attacking the 1993 will, under which *she would inherit,* though only $25,000, and also attacking the 1996 wills which favored her mother (R., 325). While she would inherit most under the 1974 will (*supra*, p.8), but the record reveals **no** petition by her to probate that will. Yet Appellants petitioned to probate that early will at 2:49 p.m. on May 17, 2002 (R., 653). Perhaps coincidentally, Kimberly McG. Ingram filed her motion to disqualify her attorney[15] Clemmons 1 hour, 20 minutes later, at 4:09 p.m on May 17, 2002 (R., 660). But Ms. Ingram acted promptly not only to file her own separate contest of the 1998 will under which she stood to inherit and the 1993 will on June 18, 2002 (R., 707), but also filed a pleading that essentially **withdrew** her opposition to the 1996 wills (*supra,* p. 4), although these wills, while heavily favoring her mother, would revoke the 1974 will and thereby **disinherit** her from the largest bequest she might receive under any possible alternative.

This record presents no conflict of **interests**, but an apparent conflict of **objectives** or **loyalties**. Mr. Clemmons has a life-long obligation to keep confidential any secrets he may have learned from Ms. Ingram in attorney-client communications. Yet the interests he advanced

[15] Still properly referred to as her attorney, because the order permitting him to withdraw as Kimberly McG. Ingram's attorney was not entered until June 11, 2002 (R., 700).

favored Ms. Ingram, but not her mother. This record presents no showing of a conflict of interest.

The trial Court erred in applying the Tennessee Rules of Civil Procedure regarding default judgments for non-appearance to statutory will-contest proceedings.

The problem here involved is that default judgments were entered against all heirs at law and all legatees who failed to appear in response to summonses, this occurring after the Probate Judge had temporarily recused himself and while another Circuit Judge was presiding.[16] Under probate law, jurisdiction over the estate is *in rem,* based upon the Court's control of the *res,* together with the constitutionally-required **notice**. This is distinguished from a summons, which is a command to appear, essential in every *in personam* case.

This is recognized by T.R.C.P., Rule 66, which states in pertinent part:

> " . . . The practice *in the administration of estates* by receivers or by other similar officers appointed by the Court shall be in accordance with the statutes of this state and with the practice heretofore followed in the courts of this state. In all other respects, an action in which the appointment of a receiver is sought or which is brought by or against a receiver shall be governed by these rules."

[16] The Probate Judge made it clear that only the will contest matters were transferred for trial, not the entire probate case. (Transcript, R., X:pp. 3-10).

The nature of the probate in solemn form was authoritatively described in *Lillard v. Tolliver*, 154 Tenn. 304, 285 S.W. 576 (Tenn., 1926), in which the Supreme Court said:

> "In the case of Davis v. Baugh, 1 Sneed, 477, Totten, Judge, in passing upon the rule of law in regard to the age of an infant who could make a will, says:
>
> > 'It is true that this rule, derived originally from the Civil Law, is the rule of the English ecclesiastical courts having jurisdiction of the subject of wills and intestates' estates. . . .'
>
> * * *
>
> "[7] Probate proceedings are not strictly suits with parties plaintiff and parties defendant, where the plaintiffs demand judgment against the defendants, They have, from time immemorial, been declared to be proceedings in rem. The purpose of such proceedings is to determine upon the disposition of the property of decedents, to apply it in an orderly way to the payment of debts, and to distribute the remainder to those entitled to receive it either by will or under the statutes of descent and distribution. Such proceedings are more akin to bills filed to administer the estates of insolvent corporations, or bills in the nature of general creditor's bills, or similar to proceedings in admiralty; similar also to the statutory proceedings in reference to the enforcement of mechanics' liens claimed upon real property. In each one of these proceedings, all persons are permitted to intervene and become parties who assert rights to the property itself.
>
> (285 S.W. at 578)

In making the Rules of Civil Procedure applicable to all civil actions, the Advisory Committee made reference to former title 20, as referring to "actions at law," T.C.A. former § 20-201, but that entire title, referring to the course of trial of ordinary litigation, did not concern itself with special statutory remedies, such as will contests, mandamus, and others always controlled by unrepealed statutes.

Soon after the adoption of the rules of civil procedure, a statutory procedure was filed, in which the statute simply followed the then-existing chancery procedures, anticipating trial only upon depositions, and the Supreme Court held such trials were abolished by the rules, *Hunter v. Bowman*, 535 S.W.2d 853 (Tenn., 1976), but added a thoughtful proviso – "We caution that *this decision is not to be construed as a blanket holding that the Tennessee Rules of Civil Procedure will prevail over seemingly inconsistent provisions of statutory law.* In this vital procedural area, having no substantive aspects, we simply hold that it is our belief that the Legislature, by the adoption of the Rules, intended to finally and forever abolish trials by deposition except to the limited extent exempted from the application of the Rule." (535 S.W.2d at 854; emphasis added.)

More recently, it was held that the Rules of Civil Procedure must yield to the special statutory procedure for enforcing foreign judgments, so that mandamus should issue to compel the Clerk of the Court to issue execution 30 days after service of summons, even though no default judgment had been entered as required by the Rules of Civil Procedure for execution, *Avanta Businesse Services Corp. v. McPherson, et al.*, 2000 Tenn. App. LEXIS 242 (W.S., 2000).

The clear basis of jurisdiction and nature of will proceedings was made clear in *Petty v. Call,* 599 S.W.2d 791 (1980):

> "Since statehood our cases have consistently held that a will contest is a proceeding in rem, and the res being the estate of the deceased, all persons who have any just or colorable claim, in the event of testacy or intestacy, have a right to become, parties, but failing to do so they are bound by the result, which is conclusive upon all the world. *E.g. Jones v. Witherspoon, 182 Tenn. 498, 187 S.W.2d 788 (1945); Lillard v. Tolliver, 154 Tenn. 304, 285 S.W. 576 (1926); Larus v. Bank of Commerce & Trust Co., 149 Tenn. 126, 257 S.W. 94 (1923); Fry v. Taylor, 38 Tenn. 594 (1858); Patton v. Allison, 26 Tenn. 320 (1846); Hodges v. Bauchman, 16 Tenn. 186 (1835); Arnold v. Marcom, 49 Tenn. App. 161, 352 S.W.2d 936 (1961).*"
>
> (599 S.W.2d, at 793)

The court also made very clear the status of heirs or legatees who might choose not to participate:

> "A will contest may be brought by any one interested party, and *all other interested parties are free to join the contestant, join the proponent, or stand aloof.* Those who are cast in the litigation may settle, if they do so in good faith, but any compromise of the contest will not inure to the benefit of the non-participating heirs, but on the other hand, if trial of the issue results in an adjudication that the will is invalid, the non-participating heirs take their respective shares of the intestate decedent's estate.
>
> (599 S.W.2d, at 796; emphasis added).

It is only in actions *in personam* that a summons, or command to appear, is the traditional and appropriate mode of exercising a state's compulsory judicial power. Although done today mainly through long-arm statutes, growing from the rationale that persons have physically acted in an area within the state's power as expressed in *International Shoe Co. v. Washington,* 326 U.S. 310, 66 S.Ct. 154, 99 L.Ed. 95 (1945). The U.S. Supreme Court has reaffirmed that the power to summon one to appear, in *in personam* jurisdiction is derived from personal presence, *Burham v. Superior Court of California,* 495 U.S. 604, 110 S. Ct. 2105, 109 L. Ed. 2d 631 (1990).

Hence, a will contest case presents no basis or need for a compulsory summons or order to appear, but merely for notice, which assures that an heir may appear or not if he wishes, more in the nature of an invitation than a command. As held in *Petty v. Call,* 599 S.W.2d 791 (1980) (discussed *supra*, p. 18), the heir has a **right** to "stand aloof" and either intervene or not, without danger of a default judgment.

V.

Conclusion

It is respectfully submitted that the judgment of the Probate Court should be reversed, and the matter be remanded for trial on the merits, that the order disqualifying Appellants' former attorney Clemmons be reversed with directions that he be permitted to participate in trial, at least in a consulting capacity if not actual trial advocacy, and that the Court clarify the law as to the nature of will probate and contest proceedings, with control of the

estate's assets and notice rather than summons as the basis of jurisdiction.

Respectfully submitted,

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APPENDIX 2

Tennessee Court of Appeals
Brief of Appellees
Sonnie E. Potts et al.

IN THE TENNESSEE COURT OF APPEALS
FOR THE MIDDLE SECTION, AT NASHVILLE

IN RE: ESTATE OF ERIN MURRAY JONES, DECEASED	)	**No. M2002-03073-COA-R3-CV**
	)	**Davidson County Circuit Court, Part VII, No. 98P-1344**

ON APPEAL FROM JUDGMENT OF THE DAVIDSON COUNTY CIRCUIT COURT, PROBATE DIVISION

Brief of Appellees
Sonnie E. Potts and Virginia S. Potts
Mary McGowan, Lucy DePriest, Kimberly Ingram, Sonnie Levi Potts, Carol Ann Potts, Kevin L. Ingram, Jr. And Mary Madeline Ingram, minors

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See Additional Counsel Following**

STATEMENT OF THE ISSUES

1. **Whether the trial court acted appropriately in entering judgment consistent with the terms of the parties' settlement agreement.**

2. **Whether a conflict of interest precludes Appellants' original counsel from continuing to represent them in this matter.**

3. **Whether the trial court correctly applied the Tennessee Rules of Civil Procedure to enter default judgment against certain heirs and legatees who declined, after notice, to participate in this will contest and, in any event, whether Appellants suffered no harm as a result of the entry of default against them, and whether this is even a proper issue on appeal.**

STATEMENT OF THE CASE[1]

As did Appellants, Appellees will limit this Statement of the Case to those procedural events most pertinent to the issues raised on appeal.

This is a will contest. The decedent, Erin Murray Jones, died August 18, 1998 (R.1). Ms. Jones was unmarried and

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[1] Hereinafter, "R" refers to the Record on appeal. "T" refers to the transcript of the proceedings before the trial court on November 4, 2002 which transcript is included with the Record and was incorporated by reference into the final Order of the trial court entered November 14, 2002 (R. 1150).

left no children (R.1). Ms. Jones' heirs at law were her twelve surviving nieces and nephews (R.1).

On September 2, 1998 two identical wills of Ms. Jones executed June 4, 1996 and October 28, 1996 were offered for probate in solemn form by nieces Mary McGowan and Lucy DePriest (R.1). Next of kin and beneficiaries named in the wills were served with notice of the solemn form proceeding (R.1).[2]

On September 11, 1998 Sonnie E. Potts and others filed an objection to the petition to probate the 1996 wills (R.13). Sonnie E. Potts and Virginia S. Potts also filed a petition to probate in solemn form the January 12, 1998 holographic will of Erin Murray Jones (R. 15, 20). Again beneficiaries and next of kin were served with notice (R.15, 20).[3]

On October 20, 1998 Mary McGowan and Lucy DePriest filed a complaint contesting the January 12, 1998 will of Erin Murray Jones (R. 26). Legatees and devisees as well as the next of kin/heirs at law were served with notice (R. 26).

Thereafter, Sonnie E. Potts and Virginia S. Potts, as proponents of the 1998 will, and Mary McGowan and Lucy DePriest, as proponents of the 1996 wills undertook discovery and prosecution of this will contest.

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[2] Appellants anticipate filing a Motion to Supplement the Record to include these notices. Appellants do not anticipate any opposition to the Motion.

[3] Appellants anticipate filing a Motion to Supplement the Record to include these notices. Appellants do not anticipate any opposition to the Motion.

On February 17, 1999, Jerry Scott, then counsel for Lucy DePriest and Mary McGowan filed a motion for entry of default judgment against certain heirs at law and legatees/devisees who had been served with notice of the proceedings but had failed to take any action to join the litigation (R. 64). The motion also requested the court appoint a guardian ad litem for minor legatees. The motion was granted by order entered November 24, 1999 (nunc pro tunc to April 16, 1999) (R. 255).

On December 22, 1999 Appellants (along with their brother John Burnett and Appellee Kimberly Ingram) filed a motion to set aside the default judgment entered against them (R. 282). The motion was granted by ordered [sic] entered July 6, 2000 (R. 313).

On February 11, 2002 Sonnie E. Potts and Virginia S. Potts offered for probate in common form the 1992 will of Erin Murray Jones (R. 423). Objections to that probate petition were filed by Kimberly Ingram on May 31, 2002 (R. 684) and Appellants on June 5, 2002 (R. 692). An amended answer was filed by Appellants on June 6, 2002 (R. 697).

Counsel for Appellants John Clemmons filed a motion to withdraw as counsel for Kim Ingram on April 10, 2002 stating as grounds a prospective conflict as a result of Ms. Ingram's intent to offer the 1974 will of Erin Murray Jones for probate (R. 572). The motion was granted by order entered June 11, 2002 (R. 700). Mr. Clemmons was later disqualified as counsel for his remaining clients (the Appellants) on motion of Kimberly Ingram entered June 21, 2002 (R. 710).

On May 17, 2002 Appellants offered for probate in common form the 1974 will of Erin Murray Jones (R. 423).

An objection was filed by Sonnie and Virginia Potts (R. 676).

This matter was scheduled for trial on November 2, 2002 and a pretrial conference on October 21, 2002. On October 18, 2002 counsel for Kimberly Ingram notified the trial court by letter that all parties to the will contest other than Appellants had reached an acceptable compromise and settlement of their interests (R. 1204). The letter requested that the court convert the pretrial conference into a settlement conference. With the agreement of all parties, through counsel, the trial court conducted a settlement conference an October 21, 2002 (R.1204). The following day, the trial court and Appellees were notified by counsel for Appellants of Appellants' acceptance of Appellees offer to settle the case (T. 10-12, 16).

On November 1, 2002, counsel for Appellants, Roger Smith, filed a motion to withdraw as counsel stating as grounds that he had been notified that day that Appellants intended to withdraw their consent to the settlement agreement (R. 1145). The trial court heard counsel's motion on November 2, 2002, the date originally scheduled for the trial of this matter. The trial court also heard the oral motion of Appellees to enforce the settlement agreement between the parties (T.1-8).

At the conclusion of the hearing on November 2, 2002, the trial court granted Mr. Roger Smith's motion to withdraw as counsel for Appellants (R.1150). The trial court also granted Appellees' motion to enforce the parties' settlement agreement, finding that the agreement was a binding, enforceable contract between the parties (R. 1150). Consistent with the terms of the parties' settlement agreement, the trial court then heard proof of the validity

of the 1998 holographic will and admitted that will to probate, subject to the terms of the settlement agreement (R.1150). The trial court's order admitting the 1998 will to probate subject to the terms of the settlement and dismissing this will contest was entered November 12, 2002. (R. 1150).

STATEMENT OF FACTS

As did Appellants, Appellees will attempt to limit this Statement of Facts to those most pertinent to the issues on appeal. A discussion of the facts pertinent to disqualification of John Clemmons as counsel for Appellants is included in that portion of the Argument.

Erin Murray Jones died August 18, 1998 (R. 1). During her lifetime, Ms. Jones amassed and managed an estate in excess of $8 million dollars (R.238), Ms. Jones was never married and left no children (R.1). Her heirs at law at the time of her death were her twelve surviving nieces and nephews (R.1).

This will contest involves five wills executed by Erin Murray Jones over a twenty-four year period. A copy of each of these wills is attached to the corresponding petition to probate (R. 1, 15, 20, 423, 653). Appellants also provide a brief summary of each will in their Statement of Facts.[4]

Appellants Raymond Burnett and Evie Moore have a peripheral interest, at best, in this litigation. They were listed as beneficiaries in only the 1974 will and, would

[4] Appellees do not agree with the estimated Interested Adversaries Shares included in Appellants' brief.

inherit only a 2.08% share of the estate pursuant to that 1974 will (R.653). The only other way Appellants could inherit more from Ms. Jones' estate is if all five wills at issue in the will contest executed over a twenty-four year period were deemed invalid.

In contrast, Appellees have a much more substantial interest in the Estate of Ms. Jones under any possible scenario. Sonnie and Virginia Potts are the primary beneficiaries under the 1998 and 1993 wills (R.15, 20, 423). Sonnie Potts is also a beneficiary under the 1974 will (653). Mary McGowan and Lucy DePriest are the primary beneficiaries of the 1996 wills and also take under the 1993 and 1974 wills (R. 1, 423, 653). Kimberly Ingram is named as a beneficiary in the 1998 and 1974 wills (R.15, 20, 653). All but Kim Ingram also take an equal one-twelfth share under the laws of intestacy (R.1).

As this Court can surmise from the record, this has been a hotly contested matter. Settlement among the principal beneficiaries was not easily achieved. Nonetheless, by the time scheduled for the pre-trial conference on October 21, 2002 all principal beneficiaries of Ms. Jones' estate who were parties to this will contest under the five wills at issue, were able to come to an agreement as to settlement (R. 1204).

Prior to the pre-trial conference, Appellees advised the trial court by letter that they had reached a settlement amongst themselves and wished to proceed to a settlement conference rather than a pre-trial conference in an effort to reach an agreement with Appellants (R.1204). Appellees explained their concern over the great expense of going to trial. Counsel for Appellants agreed to the settlement conference and also agreed that the trial judge could serve

as settlement judge for purposes of the meeting (T.10). Thereafter, counsel and the court entered into a series of settlement discussions which resulted in a total offer of $30,000 toward reimbursement of legal expenses to Appellants (T.10-11). After several rounds of discussion, the conference was adjourned. Counsel for Appellants requested an opportunity to confer with his client's over the phone that night or the next morning regarding the settlement offer from Appellees (T. 10-11). The Court offered to participate in counsel's call with his clients, but counsel declined. *Id.* Appellees also requested at that time that the Court require the in-person attendance of Appellants, who reside in Florida, for further settlement negotiations (T.12). The Court declined to require Appellants to travel out of their home state for the time being. *Id.*

The next day counsel for Appellants called John A. Day, counsel for Appellees Sonnie and Virginia Potts, and accepted Appellees settlement offer on behalf of Appellants (T.5-6, 10-12). Counsel for Appellants also called the trial court and advised of his clients' agreement to settle on the terms offered the previous day by Appellees. *Id.* The trial court then contacted John A. Day to confirm all parties' consent to the settlement agreement. *Id.* Thereafter, the trial court and all parties acted in reliance on Appellants' acceptance of the settlement agreement (T. 5-8). The trial court even scheduled other matters on its docket for those days originally reserved for the will contest trial (T. 25-27).

On November 1, 2002, the day before this matter was scheduled for trial, counsel for Appellants filed a motion to withdraw stating that his clients intended to withdraw their consent to the settlement agreement (R. 1145). Believing his clients to have entered into a binding settlement agreement which they now refused to honor, Appellants'

counsel deemed himself to be in a position of conflict and therefore moved the trial court to be allowed to withdraw as counsel of record for Appellants (R. 1145).

On November 2, 2002 counsel for all parties appeared before the Court (R. 1150). Counsel for Appellants moved the Court to enforce the settlement agreement previously sanctioned by the trial court and enter judgment thereon (R. 1150). Appellee Raymond Burnett appeared before the trial court in person at that hearing and acknowledged the [sic] he and his sister Evie Moore had agreed to the terms of the settlement agreement and also gave permission to their counsel to convey their acceptance to the trial court and Appellees (T. 17-24). Mr. Burnett confirmed in his statements to the trial court that there was no confusion as to the terms of the settlement or their actions in accepting the settlement, but that he and his sister had simply changed their minds (T. 17-24).

The trial court granted Mr. Roger Smith's motion to withdraw as counsel for Appellants (R. 1150). The trial court also held that Appellants had in fact entered into a binding settlement agreement that was sanctioned by the court prior to their attempt to withdraw consent (R. 1150). The trial court further ruled that the settlement contract was an enforceable contract under Tennessee law (R. 1150). The trial court next heard evidence on the issue of the validity of the 1998 will and admitted that will to probate subject to the terms of the parties' settlement agreement (R. 1150). The will contest was dismissed (R. 115).

ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN ENTERING JUDGMENT CONSISTENT WITH THE TERMS OF THE SETTLEMENT AGREEMENT.

A. THE TRIAL COURT ACTED APPROPRIATELY IN APPROVING THE SETTLEMENT AGREEMENT OF THE PARTIES AND ENTERING JUDGMENT ACCORDINGLY.

1. The settlement agreement received the sanction of the trial court prior to Appellants' attempt to withdraw consent.

The trial court's approval of the settlement and entry of judgment accordingly was entirely appropriate because the settlement agreement between the parties was announced to the trial judge and received the sanction of the court well before Appellants' attempt to withdraw their consent to the agreement.

Tennessee law sets forth a framework of principles to be applied by a court in determining whether a settlement agreement should be enforced in the face of a party's attempt to withdraw consent. Essentially, pursuant to these principles, a settlement is enforceable once it has been sanctioned by that court with the authority to dispose of the case (generally the trial court and not a judge assigned the case for settlement purposes only or other Rule 31 neutral). *See generally Harbour v. Brown,* 732 S.W.2d 598 (Tenn. 1987); *REM Enterprises, Ltd. v. Frye,* 937 S.W.2d 920 (Tenn. Ct. App, 1996); *Environmental Abatement, Inc. v. Astrum R.E. Corp.,* 27 S.W.3d 530 (Tenn. Ct. App. 2000); *Moxham v. Crafton,* No. M2000-00803-COA-R3-CV, 2001 WL 468669 (Tenn. Ct. App. May 4, 2001) (No Tenn. R. App. P. 11 application filed). Additionally, the terms of the settlement must be sufficiently

clear to be enforceable. *Id.* These principles are clearly met in the present case.

Mr. Raymond Burnett, on his own behalf and on behalf of his sister, appeared before the trial court in person on November 2, 2002 and acknowledged to the trial court that there was no dispute as to the terms of the settlement agreement and that he and his sister had accepted those terms and given authority to their counsel to convey that acceptance to the trial court and Appellees (T. 17-24). That acceptance was conveyed to Appellees and sanctioned by the court on October 22, 2002 (T. 10-13, 25-28). The trial court even relied upon the parties' agreement and scheduled other matters on the trial court's docket for the time originally reserved for the trial of the will contest (T. 25-28).

Yet, Appellants argue that, despite these undisputed facts, this Court should reverse the trial court's order enforcing the settlement of this matter because judicial sanction of the settlement was not given "on the record" in "open court" before Appellants' withdrawal of consent. Appellants base this argument on a very narrow application of the opinion of the Tennessee Supreme Court in *Harbour* and the opinion of this Court in *Environmental Abatement.* Other appellate court opinions interpreting and applying the *Harbour* and *Environmental* opinions, however, clarify that those opinions are not to be applied so rigidly to any and all sets of facts.

In *REM Enterprises, Ltd. v. Frye,* for example, the Eastern Section of this Court explained that a trial court may be deemed to have sanctioned a settlement agreement even though the court has not yet entered a written judgment thereon, *Frye,* 937 S.W.2d at 921-922. Thus, in

Frye, the trial court was deemed to have sanctioned the settlement agreement once the agreement was read to the court and the parties acknowledged their agreement to the Chancellor even though the Chancellor did not enter a written judgment for almost three months, well after the defendant attempted. to withdraw consent to the agreement.

In *Moxham v. Crafton,* this Court again addressed what it means for a settlement to receive the "sanction of the court". In *Moxham,* the parties reached a resolution of their construction dispute in the hallway of the courthouse during trial. The parties then reentered the courtroom and announced their settlement to the court, which the court approved. Thereafter, counsel for the parties submitted to the court a draft agreed order signed by counsel for both parties reciting the terms of the agreement. However, one of the parties withdrew its consent to the agreement before the order was entered. The trial court enforced the settlement and this Court affirmed. In so holding, this Court relied upon language adopted by the Supreme Court in *Harbour* explaining that a settlement agreement may receive the sanction of the court without a judgment having been entered thereon:

> The power of the court to render a judgment by consent is dependent on the existence of the consent of the parties at the time the agreement receives the sanction of the court *or* is rendered and promulgated as a judgment. (emphasis added)

Moxham, 2001 WL 468669 at *4 (quoting *Harbour* and *Frye*).

This Court explained in *Moxham* that "[t]he disjunctive 'or' in the above quote indicates that while simultaneous agreement by the parties and the court is a necessary prerequisite for a valid agreed order, that agreement may adequately manifest itself when the parties are before the court, even if a valid judgment has not yet been. entered." *Id.*

This Court also rejected the *Moxham* appellants' argument that, since there was no transcript or recording of the proceeding, the actual agreement of the parties was not "on the record" and thus did not meet the requirements of Tennessee law as established in the earlier opinions of *Harbour* and *Environmental Abatement.* This Court explained that the purpose of having a record is to ensure no dispute as to the terms of the agreement and where there is no dispute a technical "transcript" is immaterial to enforceability:

> [T]he purpose of transcribing a hearing during which a settlement is approved is to prove the terms of the agreement, and the parties' assent to those terms. Further, a close look at *Environmental Abatement* demonstrates a more expansive understanding of when proceedings may be considered to be "on the record" than the appellant suggests. . . .
>
> Where, there can be no dispute that agreement as to the terms existed at the time the agreement was accepted or approved by the court (which has the authority to dispose of the case), there is no basis for preventing entry of the order simply because a party changed his or her mind before the order was actually entered. A party seeking to set aside an agreed order at that point would have to rely on Rule 59, 60, Tenn.R.Civ.P., or other

> authority. Neither *Harbour* nor *Environmental Abatement* allows them to avoid the consequences of an agreement announced in open court and approved by the trial judge. (citations omitted)

Id. at *5.

As in *Moxham,* there is no dispute in the present case as to the terms of the settlement. Nor do appellants deny that they consented to the settlement agreement and allowed their attorney to convey that consent to the trial judge. Under these circumstances, it is simply not material that a court reporter was not present to take down the terms of the settlement and the parties consent thereto at the time the consent was sanctioned by the trial court.

Likewise, Appellants argument that the settlement agreement is unenforceable because Appellants' assent was not conveyed in "open court" is another attempt to place form over substance. There was an agreement that was sanctioned by the court with authority to dispose of the case before withdrawal of consent. It should not matter that this sanction was given over the phone during Appellants' counsel's call to the trial court and the trial court's call to Appellees' counsel, particularly when counsel had been before the Court the previous day. In fact, the trial court did not require Appellants to appear in person at the request of their counsel and for their convenience due to their out of state residence (T.12). The trial court and Appellees should not now be faulted for allowing Appellants this concession, particularly when there is no dispute that an agreement existed at the time the trial court was notified.

Both *Harbour* and *Environmental Abatement* are factually distinguishable from *Frye, Moxham,* and the case at bar with regard to these basic principles. In *Harbour,* the parties entered into a settlement agreement on the day of trial and announced the fact of settlement to the court but did not announce the terms. *Harbour v. Brown* 732 S.W.2d at 599. Thereafter, before entry of an order, one of the parties withdrew consent, taking the position that the settlement had been "tentative" and based upon the action of a third party. *Id.* The trial court and Court of Appeals declined to let the defendant out of the settlement and dismissed the case. *Id.* On appeal, however, the Supreme Court reversed the decision of the trial court, finding that the consent to the settlement was withdrawn by defendant before the trial court had an opportunity to sanction the agreement. *Id.* at 600.

In *Environmental Abatement,* this Court did not affirm the trial court's enforcement of the settlement, primarily because the parties assent to the settlement had not been presented to the trial court before being withdrawn, but rather was presented to a Rule 31 neutral who did not have authority to dispose of the case. *Environmental Abatement,* 27 S.W.3d at 540-541. Additionally, the withdrawing party disputed that the Court's final order accurately reflected the agreement between the parties. *Id.*

Unlike *Harbour* and *Environmental Abatement,* there is no dispute as to the terms of the settlement agreement in this case. There is no dispute that Appellants agreed to the settlement. There is no dispute that this agreement was conveyed to the trial court and received the sanction of the trial court before acceptance was withdrawn. There

is no dispute that the trial court and Appellants relied upon Appellees' agreement to the settlement.

What we have here is a case of settlers' remorse. Appellants simply changed their mind and want to back out of a binding settlement agreement. To allow Appellants to do so would undermine the reliability of the ADR process and would be contrary to current Tennessee law.

2. Appellants' jurisdictional argument is without merit.

Appellants argue that the trial court was without jurisdiction to enter judgment based upon the settlement agreement without the consent of all parties who might possibly inherit through trial on the merits. Thus, Appellant claims that the Court was required to obtain the consent of even those heirs and legatees of Erin Murray Jones who never made any appearance in this will contest before accepting the settlement agreement as the judgment of the court. This simply is not the law.

In *Petty v. Call* the Tennessee Supreme Court expressly held that notice to interested persons is not required upon the filing of a will contest. Nor is notice (and thus, consent) required of the settlement of that contest. Therefore, the trial court's admission of a will to probate pursuant to a settlement agreement between parties to a will contest was deemed appropriate even though heirs who would have taken part of the estate of the decedent if the will were deemed invalid were not given notice of the will contest or the settlement. The Supreme Court explained:

> [A]ll persons who have any just or colorable claim in the event of testacy or intestacy, have a

> right to become parties, but to do so they are bound by the result, which is conclusive upon all the world. . . .
>
> it is said that notice is served upon the thing itself and that thereby all persons interested are presumed to have notice because it is a part of common prudence for all persons who have an interest in the property to guard that interest by persons who are in a situation to protect it.

Petty v. Call, 599 S.W.2d 791, 793 (Tenn. 1980) (citations omitted).

See also *Mallicoat v. Poynter,* 722 S.W.2d 681 (Tenn. Ct. App. 1986) (holding plaintiff was not entitled to contest will and was bound by previous determination of validity of will in previous will contest even though he did not receive any notice of prior proceedings).

It should be noted that the heirs and legatees of Erin Murray Jones were given notice of the petitions to probate and only those before this Court on this appeal have chosen to participate. Notwithstanding the foregoing, Tennessee law did not require notice or consent of those persons before the trial court could approve the parties' settlement agreement and certainly was acting within its jurisdiction in doing so.

B. THE TRIAL COURT CORRECTLY HELD THAT THE SETTLEMENT AGREEMENT IS AN ENFORCEABLE CONTRACT.

Even if the trial court had not sanctioned the parties' settlement agreement prior to Appellants' attempt to withdraw their consent, the trial court's enforcement of

the agreement and entry of a judgment thereon would still have been appropriate because the trial court expressly found that the settlement agreement was an enforceable contract under Tennessee law. In *Harbour* the Supreme Court acknowledged that a compromise agreement is first and foremost a contract, subject to being enforced as other contracts. *Harbour v. Brown,* 732 S.W.2d at 600. Thus, even if one of the parties withdraws consent to the agreement prior to the trial court's sanction of the agreement preventing the court from entering a consent judgment, the settlement agreement may still be enforceable under principles of contract law.

In *Persada v. Persada* the Eastern Section of this Court affirmed the trial court's enforcement of a settlement agreement as an enforceable contract between the parties even though, under the *Harbour* analysis, the court deemed entry of a consent judgment inappropriate. *Persada v. Persada,* No. E2002-00397-COA-R3-CV, 2002 WL 31640564, *2 (Tenn. App. November 22, 2002) (No Tenn. R. App. P. 11 application filed). The parties in *Persada* entered into a written agreed property settlement through court-ordered mediation, but before the fact or terms of settlement could be presented to the trial court the husband withdrew his consent to the agreement. The wife filed a motion to enforce the agreement.

Both the trial court and the Court of Appeals agreed that, under the *Harbour* analysis, entry of a consent judgment was inappropriate as the husband withdrew consent to the agreement before it received the sanction of the court. *Id.* The Court of Appeals also agreed with the trial court, however, that the trial court could, "in an exercise of judicial economy" elect to determine the validity of the mediated agreement and enforce that agreement

pursuant to principles of contract law. "Accordingly, a valid agreement formed a basis for the entry of the Judgment, as entered by the Trial Court." *Id. See also Beaman Pontiac Co. v. Gill,* No. M1999-006660-COA-R3-CV, 2000 WL 502822 (Tenn. Ct. App. April 28, 2000) (No Tenn. R. App. P. 11 application filed) (holding that a trial court has inherent authority and equitable power to enforce contracts of settlement concerning the subject matter of a suit before it and it is not necessary to file a separate action); *Bowater North America Corp. v. Murray Machinery, Inc.,* 773 F.2d 71, 76 (6th Cir. 1985) ("There is no doubt that the court has the inherent authority and equitable power to enforce agreements in settlement of litigation before it, even if that agreement has not been reduced to writing.") (citing *Odomes v. Nucare,* Inc. 653 F.2d 246, 252 (6th Cir. 1981); *United States v. Scholnick,* 606 F.2d 160, 166 (6th Cir. 1979)); *Brock v. Scheuner Corp.*, 841 F.2d 151 (6th Cir. 1987). Similarly, in the case at bar, it was within the sound discretion of the trial court and an appropriate exercise of judicial economy for the court to determine the validity of the settlement agreement as an enforceable contract under Tennessee law and enter judgment accordingly.

The trial court also was correct in its finding that the settlement was an enforceable contract under Tennessee law. Even though the actual written settlement document was not signed by Appellants, Raymond Burnett confirmed under oath on November 2, 2002, that he and his sister Evie Moore had agreed to accept a total of $30,000 in full and final settlement of their claims in this will contest.[5]

[5] Evie Moore did not appear in person on November 2, 2002, even though, if the settlement agreement had not been enforced, the trial court could have ordered the parties to move forward with the trial of

(Continued on following page)

Mr. Burnett confirmed that there was a meeting of the minds between the parties and that there was no dispute as to the terms of the contract. Appellants' counsel also confirmed their agreement to settle and the terms in his motion to withdraw.[6] Mr. Burnett and Ms. Moore simply changed their minds after entering into the agreement. Under these circumstances, the trial court did not err in finding that the parties had entered into a binding contract for settlement and enforcing same. "A settlement agreement is merely a contract between the parties to the litigation . . . As such formation, construction, and enforceability of a settlement agreement is governed by local contract law." *Sweeten v. Trade Envelopes, Inc.,* 938 S.W.2d 383 (Tenn. 1996). A contract may either be express or implied, written or oral, so long as there is a meeting of the minds of the parties in mutual assent to its terms, sufficient consideration, and it is free from fraud, undue influence, not against public policy, and is sufficiently definite to be enforced. *Johnson v. Central National Insurance Co. of Omaha, Nebraska,* 356 S.W.2d 277, 281

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this matter. Ms. Moore should not now be allowed to use her absence to her advantage. Even though she was not present to testify on November 2, 2002, her brother and co-Appellant Raymond Burnett confirmed that there was no dispute as to the terms of the settlement agreement and also confirmed that he and Ms. Moore accepted that agreement at the time their acceptance was conveyed to the trial court. Roger Smith also confirmed these facts in his Motion.

[6] "Where a client gives express authority to an attorney to compromise a suit, the attorney's agreement to settle within those terms will bind the client" *Pressgrove v. Burns,* No. 02A01-9507-CH-00154, 1996 WL 524137, *2 (Tenn. Ct. App. Sept. 13, 1996) (Perm. to appeal denied February 3, 1997). Mr. Smith's statements regarding the settlement negotiations and Appellants' acceptance thereof also constitute a judicial admission. *See First Tennessee Bank v. Mungan,* 779 S.W.2d 798, 801 (Tenn. Ct. App. 1989).

(Tenn. 1962); *Jamestown on Signal, Inc. v. First Federal Savings & Loan Assoc*, 807 S.W.2d 559, 565 (Tenn. Ct App. 1990). *See also Moffett v. Carman,* No. 01-A-01-9501-CH00007, 1995 WL 322642, *3 (Tenn. Ct. App. May 26, 1995) (No Tenn. R. App. P. 11 application filed) (citing *Green v. John H. Lewis & Co.*, 436 F.2d 389, 390 (3rd Cir. 1971)) for the proposition that a voluntary agreement to settle a lawsuit is binding whether or no made in the presence of the court and even in the absence of a writing); *Audubon Parking Assoc. Ltd., v. Barclay and Stubbs, Inc.*, 626 A.2d 729, 733 (Conn. 1993) ("A trial court has the inherent power to enforce summarily a settlement agreement as a matter of law when the terms of the agreement are clear and unambiguous."); *Montgomery v. Smith*, 499 A.2d 444, 445 (Conn. 1985) (enforcing oral agreement to settle even though one of the parties repudiated before the agreement was put on the record in open court); *DAP Financial Management Co. v. MORFAM Electric, Inc.*, 755 A.2d 925, 927 (Conn. App. 2000) (enforcing settlement agreement under contract law even though agreement was not announced in open court before one party attempted to withdraw consent).

C. THE ENFORCEABILITY OF SETTLEMENT AGREEMENTS REACHED THROUGH ADR IS CRITICAL TO THE EFFECTIVENESS OF THAT MECHANISM AS A MEANS OF RESOLVING LITIGATION.

Since the opinion of our Supreme Court in *Harbour* in 1987, alternative dispute resolution has become a vital mechanism for resolving litigation expeditiously and inexpensively. Mediations, arbitrations, and settlement conferences are conducted every day throughout our state.

These litigation tools lose effectiveness, however, if parties are not bound to abide by the agreements reached pursuant thereto. Moreover, it is in no way practical to expect parties, counsel and the trial court to be available in the courtroom each time a settlement is reached so that the terms of the settlement may be immediately announced to the court in the courtroom with a court reporter. Nor is it reasonable to expect parties to incur the expense of filing a separate lawsuit to enforce a settlement reached in a pending lawsuit. In fact, the only persons who would benefit from such a rule are the attorneys who would be paid to file a new lawsuit to enforce settlements of the prior litigation.

In order for ADR to be effective at all parties and counsel must know that a settlement reached through ADR is binding from the moment of acceptance. At the very least, where, as here, a settlement is reached, there is no dispute as to the terms, the settlement is communicated to the trial judge and sanctioned by the trial judge, the trial court should be able to enforce the settlement whether through a *Harbour* type analysis or under basic contract principles.

II. THE TRIAL COURT CORRECTLY ADMITTED THE 1998 WILL TO PROBATE SUBJECT TO THE SETTLEMENT AGREEMENT.

Because the trial court acted appropriately in enforcing the settlement agreement and entering judgment accordingly, Appellants' second issue on appeal is moot. For example, if the settlement agreement is deemed valid and binding, as Appellees believe it should, then that disposes of the issue of whether Appellants had a right for a continuance to request a new attorney (Appellants' third

attorney) since there would be no trial. However, in the event this Court reverses the decision of the trial court enforcing the settlement agreement, Appellees do not intend to take the position that the evidentiary hearing on November 2, 2002 resolves this will contest.

III. A CONFLICT OF INTEREST PRECLUDES APPELLANTS' ORIGINAL COUNSEL FROM CONTINUING TO REPRESENT THEM IN THIS MATTER.

Appellants argue that their former counsel, John E. Clemmons should not have been disqualified as counsel for Appellants after withdrawing as counsel for Appellee Kimberly Ingram. Mr. Clemmons first entered the case as counsel for four separate contestants – Raymond Burnett, John Burnett, Evie Moore and Kimberly Ingram – by filing a motion to set aside the default judgments entered against them. Although the pleadings Mr. Clemmons filed purported to represent identical legal positions of each contestant, in truth, Mr. Clemmons' clients have disparate and divergent interests in this litigation. Over time, Mr. Clemmons came to recognize this, withdrawing as counsel for not just one, but two of the four contestants whom he originally represented.

In April 2002, John Clemmons filed a motion to withdraw as counsel for Kimberly Ingram acknowledging a conflict in his continued joint representation of Ms. Ingram and the Appellants due to Ms. Ingram's desire to offer Ms. Jones 1974 will for probate (of which she is a substantial beneficiary while Raymond Burnett and Evie Moore are only nominal beneficiaries and John Burnett is not a beneficiary at all) (R. 572). The motion was granted and Kimberly Ingram. retained new counsel (R. 700).

Soon thereafter, on May 17, 2002, Kimberly Ingram filed a motion to disqualify John Clemmons as counsel for Appellants (R. 660). As set forth in her Motion, Ms. Ingram believed that it was improper for Mr. Clemmons, in whom she had confided and trusted, to continue to represent his other clients, who had adverse interests to Ms. Ingram, in the same litigation.

The same day Ms. Ingram filed her motion to disqualify, John Clemmons filed on behalf of Appellants a petition to probate the 1974 will. Mr. Clemmons also filed a motion to withdraw this time as counsel for John Burnett, citing a conflict of interest arising from Mr. Clemmons' other clients decision to probate the 1974 will (R. 651).

In his response to Ms. Ingram's motion to disqualify, John Clemmons attempted to minimize any conflict and challenged Ms. Ingram to identify any confidences which he held of hers (R. 666). The trial court was not persuaded by Mr. Clemmons' protests and removed him as counsel for Appellants.

Appellants now argue, on appeal, a point of semantics: that Mr. Clemmons' withdrawal was not necessitated by an actual conflict of *interest* but rather a conflict of *objectives*. Appellants claim that a conflict of objectives between clients does not necessitate disqualification of counsel. Appellants also argue that Ms. Ingram placed no proof in the record to establish a conflict of interest between her and Appellants warranting disqualification of attorney Clemmons. However, at the time Ms. Ingram moved to disqualify her former counsel, the existence of a conflict was undisputed and was in fact the very basis for Mr. Clemmons' withdrawal as her counsel. The issue at the disqualification hearing was whether, based upon the

acknowledged conflict of Mr. Clemmons in representing Kim Ingram, he could continue to represent his remaining clients whose interests were adverse to Ms. Ingram. By the time of the hearing, Mr. Clemmons and Appellants had attempted to eliminate this conflict by, themselves, offering the 1974 win for probate. The trial court, however, was not persuaded by this hollow attempt to eliminate the obvious conflict presented by Mr. Clemmons' continued representation of Appellants.

Indeed, that conflict is best exhibited through Mr. Clemmons' own statements to the court in his brief in response to the motion to have him disqualified R. 666). In Paragraphs 1 and 7 of his response, Mr. Clemmons impugns the motives of Kim Ingram, his former client, in supporting certain wills in which Mary McGowan (her mother) would benefit. He claims that Ms. Ingram's true motive was to facilitate a settlement that would in essence exclude the Burnetts and Evie Moore. He alleges that Ms. Ingram's "primary interest is to see her mother be successful in this will contest even to her own detriment . . . and [supporting the 1996 wills] is merely a technique to have her mother be successful, or permit negotiations of settlement, all to the detriment of John Clemmons' clients." It is really incredible that Mr. Clemmons would make such statements while at the same time claiming the absence of a conflict between Kim Ingram and Appellants. That Mr. Clemmons would make such accusations against a former client and accuse her of taking action that injures Mr. Clemmons remaining clients proves the conflict. Even as he sought to avoid disqualification, Mr. Clemmons was digging an even deeper hole for himself and, in the process, confirming the adversity of interests between Kim Ingram and Mr. Burnett and Ms. Moore.

An actual conflict of interests, as well as the appearance of impropriety is also illustrated by Mr. Clemmons' offer in his brief not to participate in direct or cross examination of Ms. Ingram at trial. This is clearly a situation where Mr. Clemmons' duties to a former client dilute the loyalties to his other clients. Further, there is simply no legal basis to allow Mr. Clemmons, in the face of an acknowledged conflict of interest, to fashion his own remedy over the objections of his former client.

Ms. Ingram's interests' in this matter simply are not the same as Appellants. Based on Appellants' calculations in their own brief, some significant differences are that:

a) Kim Ingram takes under the 1998 will, while Raymond Burnett and Evie Moore do not;

b) Kim Ingram takes approximately $520,000 under the 1974 will, while Raymond Burnett and Evie Moore take substantially less;

c) Kim Ingram takes nothing through intestacy, while Raymond Burnett and Evie Moore would each take approximately $346,667; and

d) Kim Ingram does not challenge the 1996 wills, Appellants do.

The adversity of interests between Ms. Ingram and Appellants is also exhibited by their current conflicting legal positions with regard to the settlement agreement, as Ms. Ingram is having to spend legal fees to uphold a settlement which Mr. Clemmons' clients seek to invalidate.

Not only are Appellants incorrect in their denial of the existence of a conflict of interest, but Appellants cite no authority for their arbitrary distinction between a conflict

of *interest* and a conflict of *objectives* which is, in reality, nothing more than semantics. To the contrary, in the recent opinion *Clinard v. Blackwood,* the Tennessee Supreme Court explained that disqualification is appropriate even in the absence of an actual conflict if there is an appearance of impropriety: "The appearance of bias is as injurious to the integrity of the judicial system as actual bias." *Clinard v. Blackwood*, 46 S.W.3d 177, 186 (Tenn. 2001). Both an appearance of impropriety and actual conflict exist in the present case.

The trial court's disqualification of an attorney is reviewed under an abuse of discretion standard. *Clinard,* 46 S.W.3d at 182. Appellants have not shown such an abuse of discretion here. In fact, the ruling of the trial court is entirely consistent with Tennessee law at the time of the motion to disqualify and current law.

The applicable ethical rules at the time the trial court ruled to disqualify Mr. Clemmons as counsel for Appellants were the Code of Professional Responsibility found in Rule 8 of the Tennessee Supreme Court Rules. The Disciplinary Rules contained therein are mandatory in character and expressly govern conflicts of interest. DR 5-105 states in relevant part:

> A lawyer shall not continue multiple employment if the exercise of independent professional judgment in behalf of a client will be or is likely to be adversely affected by the lawyer's representation of another client, or if it would be likely to involve the lawyer in representing differing interests, except to the extent permitted under DR 5-105 (C). DR5-105(B).

The only circumstances in which such representation of multiple clients would be allowed to continue is "if it is obvious that the lawyer can adequately represent the interest of each and if each consents to the representation after full disclosure . . . " DR 5-105 (C).

Furthermore, DR 4-101(B) provides that a lawyer shall not knowingly:

> (2) Use a confidence or secret of a client to the disadvantage of a client.
>
> (3) Use a confidence or secret of a client for the advantage of the lawyer or of a third person, unless the client consents after full disclosure.

In addition, numerous Ethical Considerations from the former Code apply to this matter:

1) Neither the lawyer's personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute the lawyer's loyalty to the client. EC 5-1.

2) A lawyer should not continue employment that will adversely affect the lawyer's judgment on behalf of or dilute the lawyer's loyalty to a client; this problem arises whenever a lawyer is asked to represent two or more clients who may have differing interests, whether such interests be conflicting, inconsistent, diverse, or otherwise discordant. EC 5-14.

3) A lawyer should resolve all doubts against the propriety of representation and should never represent in litigation multiple clients with differing interests. EC 5-15.

4) The obligation of a lawyer to preserve the confidences and secrets of the client continues after the termination of employment. EC 4-6.

Since the trial court ruled on this issue, the Supreme Court adopted new Rules of Professional Conduct. Of those, the following apply to the issue before the court:

1.7 (a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) each client consents in writing after consultation.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyers own interest, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents in writing after the consultation. When representation of multiple clients is a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

1.9 (a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same matter in which that

person's interests are materially adverse to the interests of the former client, unless the former client consents in writing after consultation.

(c) Unless the former client consents after consultation, a lawyer who has formerly represented a client in a matter, or whose present or former firm has formerly represented a client in a matter, shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules otherwise permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation of the former client except as these Rules otherwise permit or require with respect to a client.

Tennessee Supreme Court Rules of Professional Conduct.

Applying the above rules and the ruling in *Clinard* to the case at bar there is no question that Mr. Clemmons could not, after withdrawing as counsel for Mr. Ingram due to a conflict of interest, continue to represent Appellants without Ms. Ingram's consent. As evidenced by her motion to disqualify, Ms. Ingram has not provided such consent. Additionally, even had Ms. Ingram consented, which she did not, representation would have placed Mr. Clemmons in a position of conflicting loyalties as the interest of Ms. Ingram and the Appellants have become even more adverse. The trial court did not abuse its discretion in disqualifying Mr. Clemmons and its ruling should be affirmed.

IV. APPELLANTS' CHALLENGE OF THE TRIAL COURT'S ENTRY OF DEFAULT JUDGMENTS FOR NON-APPEARANCE IS WITHOUT MERIT.

A. APPELLANTS' CANNOT CHALLENGE THE TRIAL COURT'S ENTRY OF DEFAULT JUDGMENT FOR THE FIRST TIME ON APPEAL.

Appellants challenge the authority of the trial court to enter default judgments against heirs and legatees/devisees who failed to make an appearance in this will contest. Although Appellants moved the trial court to set aside the default judgments entered against them, which motion was granted, no one has challenged the entry of default judgment against the non-participating heirs and legatees/devisees at the trial court level. As such, this issue is improper on appeal. *See Lawrence v. Stanford,* 655 S.W.2d 927, 929 (Tenn. 1983) ("It has long been the general rule that questions not raised in the trial court will not be entertained on appeal . . .); *Davis v. Tennessee Department of Employment Security,* 23 S.W. 3d 304, 310 (Tenn. Ct. App. 1999).

B. EVEN IF IN ERROR, THE TRIAL COURT'S ENTRY OF DEFAULT JUDGMENTS IN THIS WILL CONTEST PROCEEDING WAS HARMLESS.

Appellees are perplexed by Appellants' complaint regarding entry of default judgments against certain heirs at law and legatees who have chosen not to participate in this will contest. Erin Murray Jones died August 18, 1998. Probate proceedings were initiated September 2, 1998. Heirs at law and legatees/devisees were served with notice of the solemn form probate of the 1996 wills (R.1). Heirs and legatees/devisees were also served with notice of the

petition to probate the 1998 will (R. 15, 20). In 1999, after a failed attempt at mediation, attorney Jerry Scott, then counsel for Appellees Mary McGowan and Lucy DePriest moved the court to enter default judgment against certain heirs and legatees who had not appeared or taken any action with regard to the probate proceedings or will contest (R. 64). Each of these persons was served with notice of the motion for default (R. 64). Of these persons, only the Appellants Raymond Burnett, Evie Moore and their brother John Burnett (who later sought a voluntary dismissal from these proceedings) and Kimberly Ingram have ever spoken up to complain about entry of the default judgment (R. 282). On December 23, 1999, these parties moved the Court to set aside the default judgment entered against them so that they might participate in this will contest (R.282). The trial court granted Appellants' motion and set aside the entry of default against these parties and allowed them to enter into the will contest (R.313). As a result of the Appellants late appearance in the case numerous depositions were re-taken and, at their request, the trial date in this matter has been continued.

Thus, even if the trial court's entry of a default judgment against Appellants had not been appropriate under the law of this state, they can claim no harm, as the order was set aside upon their request and they have been allowed to participate fully in these proceedings. As for the heirs and legatees who have chosen not to participate in this litigation and not to challenge the entry of default, Appellants are without standing to complain.

Rule 36(b) of the Tennessee Rules of Appellate Procedure provides that "a final judgment from which relief is available and otherwise appropriate shall not be set aside unless, considering the whole record, error involving a

substantial right more probably than not affected the judgment or would result in prejudice to the judicial process." Here, entry of default, even if in error, does not warrant reversal of the judgment entered pursuant to and in enforcement of the settlement agreement because there has been no proof of harm.

C. THE TRIAL COURT DID NOT ERR IN ENTERING DEFAULT JUDGMENTS FOR NON-APPEARANCE IN THIS WILL CONTEST.

The trial court did not err in entering default judgments against certain heirs and legatees who had not appeared in the probate proceedings or will contest litigation. Without question, the Tennessee Rules of Civil Procedure apply to will contest proceedings. *See e.g. Green v. Higdon,* 870 S.W.2d 513 (Tenn. Ct. App. 1993) (applying T.R.C.P. 56 to a will contest). Among those rules, Rule 1 provides: "These rules shall be construed to secure the just, speedy and inexpensive determination of every action." Inherent in this directive is that, a trial court may and should use the Rules of Civil Procedure to establish reasonable parameters for control of the case. Rule 55 of the Tennessee Rules of Civil Procedure allows entry of a default judgment against a party who chooses not to respond or participate in the litigation is one means of doing so.

Appellants argue that all "interested parties [to a will contest] are free to join the contestant, join the proponent, or stand aloof." Appellees agree. However, it is not unreasonable to require those parties to choose one of those positions within a reasonable period of time. Otherwise, interested persons in a will contest may choose to stand aloof while other heirs incur legal expenses during the

prosecution of the litigation only to appear at the end of the day in the face of an impending settlement or on the eve of trial to demand "a piece of the pie" or to demand that discovery be reopened and the trial postponed. Both the court and the parties to a will contest are entitled to know the universe with which they are dealing. Rule 55 allows just that.

Although Appellees could identify no Tennessee cases specifically discussing the application of Rule 55 to will contest proceedings one way or the other, its application is not inconsistent with Tennessee law regarding will contests. As noted above, Tennessee law requires persons to know and protect their property rights, particularly in the context of probate and will contests. *See Petty v. Call,* 599 S.W.2d 791, 793 (Tenn. 1980). In fact, Tennessee law has consistently held heirs bound to the findings of a will contest proceeding or settlement thereof even when the heir did not have notice of the proceeding or settlement. *Id.*

Additionally, TENN. CODE ANN. § 32-4-101 provides that, upon the filing of a will contest, the trial court may require the contestant to post a bond payable to the executor or other proponent of the will. Thereafter, all legatees or devisees must either also make bond or make known that he or she claims nothing under the will and is willing that it be set aside. TENN. CODE ANN. § 32-4-102. The effect of entry of default judgment pursuant to Rule 55 of the Tennessee Rules of Civil Procedure is really no different, in that it allows the court and the parties to the contest to know with whom they are dealing. In fact, by giving notice of the motion for default judgment to all those who had not earlier chosen to participate in the will contest, the court and the parties to this will contest went

to much greater lengths than would otherwise be required to make sure that the heirs and legatees were aware of the contest proceedings and to give them an opportunity to participate.

CONCLUSION

For the foregoing reasons, Appellees respectfully request that this Honorable Court affirm the trial court's entry of judgment consistent with the parties Settlement Agreement and dismiss this appeal.

Respectfully submitted,

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